THE NEXT ANNUAL MEETING WILL BE HELD AT MEMPHIS, TENN., OCT. 23-25

AMERICAN BAR ASSOCIATION JOVRNAL

OCTOBER, 1929

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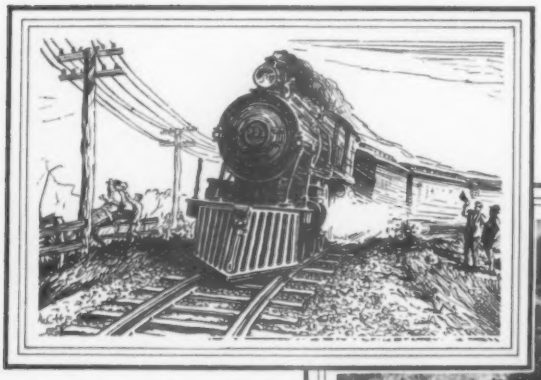
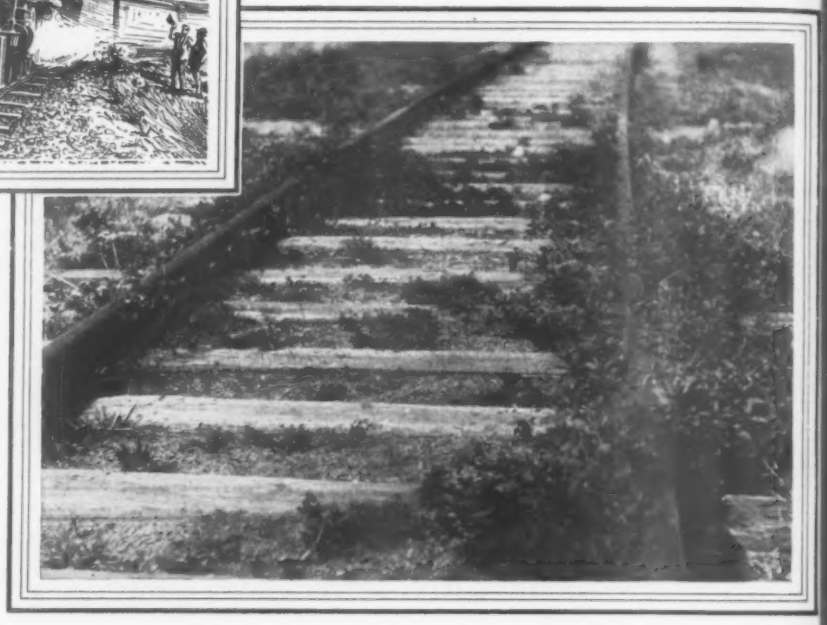
INVESTMENT LESSONS FROM THE PAST!

Rusting Rails



When a branch line railroad or interurban street railway is abandoned there is little salvage for the security holders. The value of rusty rails as scrap metal is scarcely enough to offset the cost of pulling them up.



New inventions and developments are constantly affecting every line of industry, threatening to change many of the highly rated securities of today into the "cats and dogs" of tomorrow.

IN driving through many parts of the United States and Canada, you will frequently bump across the tracks of a once-prosperous branch line railroad or street car line, that is now abandoned to rust and weeds.

In past years, investors hopefully sunk millions of dollars into these enterprises. Their possibilities seemed boundless. Their securities sold at a premium. Then came the automobile, the truck and the motor bus, diverting the traffic which they had formerly enjoyed.

Today the securities of many of these properties are being regretfully removed from the strong boxes of their owners, as no longer worth the space they occupied.

Twenty years from now some of the stocks which are being so enthusiastically boomed today will have sunk to the same position, in the opinion of their owners, as have the securities of many street railway and branch line railroads today.

But the man who has selected Travelers Insurance Annuity or Retirement Income 64 as a means of providing for his old age, will have no cause to regret his decision. These policies are backed by the tremendous resources of The Travelers, and triply safeguarded by the factors of selection, supervision and diversification in the investment program of The Travelers. No matter whether the market be up or down, whether business is dull or booming, such a policy is sure to be at par when age or death brings it to its maturity.

Ask any representative about Retirement Income Policies

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Glimpses of a Political Underworld

THE trial in Berlin of two Russians, Pavlonovsky and Orlov, for forgery of documents accusing Senators Borah and Norris of accepting bribes from the Soviet government is described in a dispatch from the American Embassy at Berlin, embodied in a communication from the Under-Secretary of State, J. P. Cotton, to Senator Borah himself. The communication is printed in the United States Daily for Aug. 24. Both the defendants were convicted and given sentences of four months each, but as allowance was made for imprisonment while awaiting trial, the sentence permitted them to be set at liberty.

The brief account of the proceedings seems to give a hint of a European underworld of intrigue, in which the sale of real or forged political documents appears a natural proceeding. The prosecution on one charge was due to a report to the authorities by Mr. Knickerbocker, Berlin correspondent of the New York Evening Post and the Philadelphia Public Ledger. It seems that one Felix Dassel, a former Russian officer, acting as an intermediary, offered to sell Mr. Knickerbocker documents incriminating the two senators. On Mr. Knickerbocker professing interest, "he brought him in touch with Pavlonovsky, who claimed to have been formerly in the employ of the G. P. U. (Russian Secret Political Police) and the Soviet embassy in Berlin." As the documents proved to be forgeries he was arrested, as was also Orlov, who admitted giving the documents to Pavlonovsky, but denied that he knew Pavlonovsky intended to sell them to Knickerbocker. After his arrest Pavlonovsky claimed they must have been forged by Orlov, from whom he had obtained them in good faith, while Orlov himself, a former Czarist official investigator, said that the Soviet "G. P. U." had forged them in order to discredit him. At the trial the latter relied for his defense on the statement that the letters he had forged gave the true reading of actual documents. The report gives these further details about him:

"The defendant Orlov was doubtless the most interesting figure in the trial. He began his career as prosecuting attorney in Russian Poland. During the war he was attached to the Czar's headquarters and as an official investigator in important political cases is said to have held a powerful position in Czarist Russia. He owns a castle in Germany and is reputed to be a man of means. His activity as a forger of documents, it was alleged, was prompted more by a deep hatred of the Soviet régime rather than by a desire for pecuniary advantage. Pavlonovsky, on the other hand, is a mysterious personality. His real name is supposed to be Karpov."

There was another case against the two defendants, "a G. P. U. espionage affair with which the Reichskomissariat for Public Order was supposed to have been concerned," but it seems to have broken down. This case, according to the account in the United States Daily, had "to do with forgeries of the so-called Trillisser letters. Trillisser is the head of the foreign department of the G. P. U. and his letters supposedly contained instructions regarding espionage in the Reich Ministry of the Interior.

"The State's witnesses at the trial were Mr. Knickerbocker and one Sievert, a Russian 'emigré,' former army officer and spy in the employ of the defunct Reichskommissariat for Public Order. According to the testimony of Regierungsrat Muelheisen, the head of the Reichskommissariat, which

has only recently been abolished, Sievert had rendered the German authorities valuable service in connection with anti-Soviet and anti-Communist espionage in Germany. It appears that as a reward for his services Sievert was granted German naturalization.

"After the arrest of the defendants on complaint of Mr. Knickerbocker, Sievert also preferred charges against them asserting that they had likewise sold him forged documents. His testimony being constantly restricted by the presiding judge, Sievert had a physical breakdown toward the end of the trial, and the charge against the defendants was confined chiefly to the Knickerbocker case."

Special Meeting of Professional Ethics Committee

CHAIRMAN THOMAS FRANCIS HOWE, of the Association's Committee on Professional Ethics and Grievances, has sent a notice to members of State Boards of Law Examiners, Grievance Committees of Bar Associations, Committees on Professional Ethics of Bar Associations and Deans and Faculties of Law Schools, calling attention to a public meeting which his committee will hold at Memphis, Tenn., in connection with the Annual Meeting of the Association. A public meeting by a committee at such a time is something of an innovation, but Chairman Howe's letter explains fully the special reasons which rendered the step advisable. It is as follows:

"As an auxiliary to the Annual Meeting of the Association this Committee will hold a public meeting on Monday, Oct. 21, 1929, on the mezzanine floor of the Peabody Hotel, Memphis, Tenn. The morning session will begin at 10:30 a. m. and the afternoon session at 2:15 p. m.

"The meeting will be held for the twofold purpose of enabling the Committee to present certain matters which it believes should engage the attention of the profession, and to give members and representatives of other organizations an opportunity to present and discuss new subjects, as discussion at the Annual Meeting is limited to the prearranged program.

"The subjects which the Committee wishes to present for your consideration are:

"(1) The study of legal ethics, the necessity for it, and what may be done to encourage it.

"(2) The practice of law in the District of Columbia by those not admitted in the District courts, the necessity for some form of disciplinary supervision over those engaged therein and how such supervision can be secured.

"The Committee believes that many of the complaints of minor infractions of ethical standards are due to ignorance, not only of the standards themselves but of those sound reasons of public policy which underly the necessity for their existence. This is not astonishing when it is known that the study of legal ethics is usually optional rather than obligatory in even the best of our law schools. That the schools themselves have

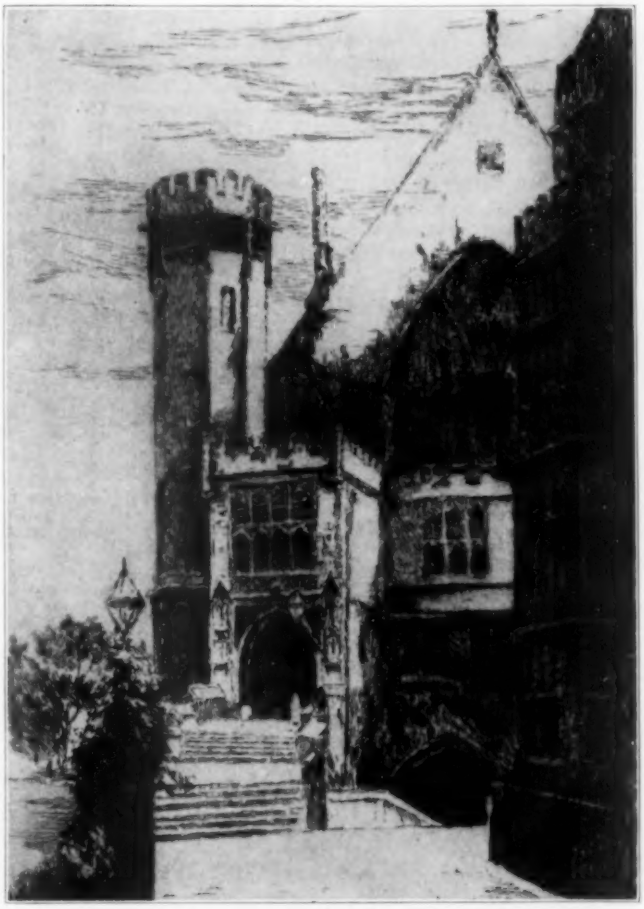
not corrected this condition is probably due to professional apathy. The Committee believes that a thorough knowledge of proper ethical standards and the reasons therefor is necessary to enable the lawyer of today to combat the present tendencies toward commercializing the practice and destroying its professional character.

"The necessity for discussion of the second subject arises out of the fact that there is no statutory regulation of the practice of law in the District of Columbia. Only a portion of the many lawyers in Washington are admitted to practice in the courts of the District and they appear to be the only ones who are subject to any disciplinary authority. Lawyers move to Washington from all sections of the country, specialize in practice before the various bureaus, commissions and departments, are admitted on motion in the U. S. Supreme Court, and yet are without disciplinary supervision no matter how grossly improper their conduct may be.

"After each of these subjects is presented they will be open for general discussion in which all are invited to participate.

"The meeting will also be open for the consideration of other subjects which may be presented to it pertaining to professional and judicial standards and conduct. If such subjects are presented to the Chairman in advance of the meeting they will be assigned a proper place on the prearranged program. If time permits, a member of the Committee will give a talk concerning the methods and scope of the varied activities of the Committee, what it has accomplished in its efforts to maintain professional standards and the possibility of greater accomplishment through professional cooperation and understanding.

"You are cordially invited to be present and to participate in the discussion."



Library of Middle Temple. Etching by Rosa M. Whitlaw

Gift to Middle Temple's Library

THE Carnegie Endowment for International Peace has presented the Middle Temple with $7,000 for the purpose of enabling it to fill the gaps in its American Reports and Law Texts. This gift, it is stated, will make the Middle Temple's American collection the finest and most complete in Europe and greatly increase its usefulness to the profession in England as well as to American lawyers whose professional engagements take them to London. During the past few years the suggestion has been made several times that the gaps be filled by donations of duplicate copies or sets by private individuals and institutions on this side, but the Carnegie Endowment's gift solves the problem much more quickly and effectively. The notice about it in the daily press must have vividly recalled the beauty of the Library building to those American lawyers who took part in the pilgrimage to England in 1924, as well as the generous hospitality extended to them by the Middle Temple and other Inns.

Judicial Terms in North Dakota

THE report of the Legislative Committee of the North Dakota Bar Association, contained in the August issue of Bar Briefs, shows that the legislature showed itself quite adverse to any increase in salaries of the judges of the Supreme Court and district courts, with the result that the bill introduced for that purpose failed of passage. However, concurrent resolutions for proposed constitutional amendments to increase the terms of the Supreme Court Justices to ten years and of the district judges to six years passed both houses and will be submitted to the people for approval or rejection. A vigorous effort will be made to secure their adoption. The report is signed by Fred J. Traynor, Chairman.

Oklahoma Lawyers Organize Under New Act

STEPS have been taken by the State Bar Commission of Oklahoma to organize the State Bar in accordance with the act passed by the last legislature. Ballots for the election of one member of

the Board of Governors from each of the nine Supreme Court Judicial Districts of the state were sent out to all registered, eligible lawyers on August 28. Several nominations have been made in most of the districts and the contest promises to be lively. The counting of the ballots will begin Oct. 1 and the Board will hold its first meeting on Oct. 5, according to Judge J. R. Keaton, Chairman of the State Bar Commission, which is charged with the responsibility of putting the Act in operation and organizing the Bar in accordance with its terms. The regular organization meeting will no doubt be called soon afterward.

The Board of Governors is to consist of thirteen elected members, four chosen from the state-at-large and nine from the Supreme Court Judicial Districts. However, the Act authorizes the Governor to appoint the four state-at-large members for the first Board and constitutes these four a State Bar Commission to attend to all necessary preliminaries. Their successors will be elected from the entire state.

The Board is given substantial powers with regard to admission to practice, formulation of rules of professional conduct, disbarment, etc. With the approval of the Supreme Court and subject to the provisions of the Act, it is authorized "to fix and determine the qualifications for admission to practice law in this state, and to constitute a committee of not more than seven members with power to examine applicants and recommend to the Supreme Court for admission to practice law those who fulfill the requirements, and no person shall be admitted to practice without such recommendation." Also, with the approval of the Supreme Court, the Board of Governors "shall formulate and enforce rules of professional conduct for all members of the Bar in the State; and shall by rule prescribe the causes for suspension of license to practice, for disbarment and for such other disciplinary measures as it may deem proper." The section dealing with Disbarment is as follows:

"The Board of Governors shall have power, after a hearing, for any of the causes now existing in the laws of the State of Oklahoma, or hereafter prescribed by rules adopted in pursuance of this Act, warranting disbarment or suspension, to disbar members or to discipline them by reproval, public or private, or by suspension from practice, and the board shall have the power to pass upon all petitions for reinstatement. The Board of Governors shall keep a transcript of the evidence and proceedings in all matters involving disbarment or suspension and shall make findings of fact and a decision thereon. Upon the making of any decision to disbar or suspend any attorney from practice the board shall immediately file a certified copy of said decision, together with said transcript and findings, with the clerk of the Supreme Court. Any person so disbarred or suspended may, within sixty days after the filing of said certified copy of said decision, petition said Supreme Court to review said decision or to reverse or modify the same, and upon such review the burden shall be upon the petitioner to show wherein such decision is erroneous or unlawful. When sixty days shall have elapsed after the filing of said certified copy, if no petition for review shall have been filed, the Supreme Court shall make its order, striking the name of such person from the roll of attorneys or suspending him for the period mentioned in said decision. If, upon review, the decision of said Board of Governors be affirmed, then said court shall forthwith make said order striking said name from the rolls or of suspension. The Board shall have power to appoint one or more committees to take evidence and make findings on behalf of the Board and forward the same to the Board with a recommendation for action by the Board. The powers herein conferred are in addition to the powers to disbar or discipline members of the bar as now held and exercised by the courts."

An interesting feature of the organization is the division of the Bar into sections and the appointment of an administrative committee for each of them. The active members of the State Bar residing in each district court judicial district constitute a section, and an administrative committee consisting of five members is to be appointed by the Board of Governors. The first appointments are to be made by the four members of the Board appointed by the Governor. The duties of the committee will be to "receive and investigate complaints as to the conduct of members, make findings and recommendations and forward its report to the Board of Governors for action, which may either act upon the report, or take additional evidence, or set aside the report and hear the whole case de novo, as it may elect."

Wigmore to Retire as Dean

ANNOUNCEMENT is made that John H. Wigmore will retire as Dean of the Law School of Northwestern University, in compliance with the institution's policy of retiring deans when they reach the age of sixty-five. He will have the title of Dean Emeritus and will continue to act as Professor of Law. It is superfluous, in this connection, to call the attention of lawyers to the distinction which Prof. Wigmore has lent, and will continue to lend, to the institution and to the profession itself by his monumental and scholarly labors both as a writer and a teacher. It must, also, at least to those who know him, seem something of a contradiction to employ the word "retirement" in any connection with one whose activities are so unabated and whose interests are so constantly extending to other and important fields. He will be succeeded as Dean by Prof. Leon A. Green of Yale University, formerly Dean of the University of North Carolina Law School. In commenting on Prof. Wigmore's retirement, the Ohio Law Bulletin and Reporter gives this brief summary of a very notable career:

"The noted author, who holds the degree of Doctor of Laws from three universities, Wisconsin, Harvard and Louvain, has had a long and brilliant career in teaching and legal writing. After serving for three years as Professor of Anglo-American Law at Keio University, Tokyo, he came to Northwestern in 1893 and was elevated to the position of Dean in 1901. Throughout his years as lecturer he has produced a long series of scholarly works on various legal subjects, the most noted of which is, of course, his Treatise on Evidence, a four-volume work first published in 1904 and revised in 1923. He also rendered conspicuous service during the late war, as lieutenant-colonel in the Judge Advocate's division, and was awarded the Distinguished Service medal, and he has been further honored by being made a chevalier of the Legion of Honor and a member of the League of Nations' committee on Intellectual Cooperation."

Legislation on Aeronautics, 1928-29

AN immense amount of legislation on aeronautic subjects during the 1928-29 sessions of the legislatures is reported in the Air Commerce Bulletin, issued by the Department of Commerce, according to a recent issue of the United States Daily. A total of 250 bills were introduced in the legislatures of forty-one states, of which number 106 were enacted, 65 defeated and 79 carried over. Nevada and Louisiana were the only states with legislatures in session which did not consider this kind of legislation. Florida was the most active in aeronautical legislation, with 29 bills introduced. 11 enacted, only two actually defeated, and action pending or data unavailable on the other 16. Minnesota, New York, Connecticut, Pennsylvania, Wisconsin, Michigan, Illinois, Tennessee and Iowa also showed great interest in the subject, judging from the number of measures introduced.

"While the major part of the legislation," the report says, "has been with reference to the regulation of aircraft and the establishment of airports, there has been a manifestation of some legislative activity in other fields, more particularly in connection with an attempt to cope with the new situations which have appeared with the phenomenal growth of aeronautics.

"Already different theories as to the proper method of meeting these problems by the enactment of statutes have appeared and probably are the forerunners of widely divergent legislative policies. The proper solution of these problems, which involves the weighing of the interests of the general public on one hand and the encouragement of the development of civil aeronautics on the other, requires careful and thorough investigation."

Bills not concerned with airports or the licensing of aircraft were of a widely divergent character, we are told. Five states authorized temporary commissions to study aviation. Michigan authorized a State Board of Aeronautics, and New Jersey established a State Board to supervise the establishment of airports. In Illinois and Michigan statutes were enacted authorizing railroad companies to transport by airplane, while Missouri defeated a bill of this character. Michigan, Iowa and New Jersey passed measures relating to aeronautic insurance. Michigan passed a bill placing a tax on gasoline consumed by aircraft, while California defeated such a bill. In California airplanes were specifically included in a quarantine regulation to prevent the introduction of agricultural pests into the state, and are subject to inspection. Michigan authorized the mapping of certain parts of the state by aerial photography.

Questionnaire on Civil Litigation

THE Institute for the Study of Law of Johns Hopkins University is cooperating with a committee of New York lawyers in order to discover the facts in regard to civil litigation throughout the country, according to a notice in the New York Times of Sunday, Aug. 11. A ten-page questionnaire prepared by Prof. Herman Oliphant of the Institute and the cooperating committee has been submitted to a group of one hundred prominent lawyers and law firms in New York, and in a few weeks it will be amended as a result of suggestions from this group and submitted to 10,000 lawyers throughout the nation. The questionnaire seeks to secure detailed history of one or two representative cases handled by the lawyer from the beginning of the dispute to the ultimate effect of the litigation. It asks first for the facts of the case and the underlying cause of the litigation. One group of questions deals with efforts at conciliation—why they failed and how much time they consumed. It then proceeds to "the suit proper; the work done by the lawyers in preparation; the pleadings, trial, appeals to higher courts and new trials, and the final disposition of the case. A set of questions is devoted to the expenses involved. Finally, the questionnaire asks for the ultimate results of the suit—whether valuable business relationships were destroyed, what questions of law the case settled, and what was the value of the piece of litigation."

Trained Probation Officers Needed in Federal Courts

THE extent to which the Federal probation law which was passed in 1925 is utilized in the various federal districts is set forth in a press statement recently made by Charles L. Chute, General Secretary of the National Probation Association. After calling attention to the fact that this statute gives the courts of the United States the same powers which the judges of all courts in New York, Massachusetts, Pennsylvania, and many other states have possessed for years to suspend sentence and place youthful offenders under supervision, Mr. Chute says:

"Up to the present time only 7 out of 98 federal districts have secured paid probation officers under this law, due to the fact that a wholly inadequate appropriation has been made for the purpose. As a result, volunteers have been used, whose work has been extremely ineffective or else there has been little or no use made of the probation plan. This is extremely unfortunate because of the figures and facts that confront us. We find that there were 48,359 convictions in the United States Courts in the year ending June, 1927. There were 7,961 federal prisoners committed to penal institutions during the same year, a much larger percentage of commitments than in state courts having probation officers. Seventy-one per cent of federal prisoners' cases were reported as having been in prison for the first time. Half of these prisoners were under thirty years of age; 860 were boys under twenty; 53 percent were married; 80 percent were natives of the United States. Among these youthful first offenders there is undoubtedly a large field for the extension of effective probation work. With probation departments employing men and women trained for the work established in all United States District Courts there will be an effective agency to enforce the conditions imposed by the court, to assist in obtaining employment to guide and direct offenders whom the court, after an investigation, deems worthy of a chance to redeem themselves.

"The judges in many United States districts are now urgently requesting trained probation officers. The probation officers appointed have demonstrated their value. The Federal Probation Officer at Pittsburgh states that the total maintenance cost in the prisons, jails or reformatories to which his 106 probationers last year would in most cases have been committed, except for probation, would

amount to over $26,000. The actual cost of the probation work for the period covered was $1,097—a saving to the Government of about $25,000. In Massachusetts, New York and West Virginia districts where the number of cases handled has been greater, the saving also would be greater.

"The Committee on Federal Probation of the National Probation Association has among its members the Hon. Edwin L. Garvin, former U. S. District Judge, Chairman; Adolph Lewisohn, New York; Dr. Hastings H. Hart, of the Russell Sage Foundation, New York; Hon. Charles Evans Hughes, New York; Hon. George W. Wickersham, New York; Dr. George W. Kirchwey, former warden at Sing Sing, and former Dean of Columbia Law School; Hon. William McAdoo, Chief City Magistrate of New York; Hon. William Clark, United States District Judge, Newark, N. J.; Hon. John C. Knox, United States District Court, New York; the Hon. Herbert C. Parsons, Massachusetts Commission on Probation; Hon. James M. Norton, Jr., United States District Judge, Boston; Rabbi Stephen S. Wise, of New York, and Charles L. Chute, New York, Secretary."

New York Bankruptcy Inquiry Ends

THE investigation of bankruptcy administration before Federal Judge Thomas D. Thacher in New York has been concluded as far as the proceedings before that court are concerned, according to a statement in a recent issue of the New York Times. The investigation, we are told, has resulted in the disclosure of numerous evils in the handling of bankrupt estates. As a result, "amendments to the bankruptcy act or changes in the Supreme Court general orders or changes in local district rules, or a combination of all three, may be suggested in the final report to be submitted to the bar associations. The reforms will be intended primarily to improve the administrative machinery of the law and to make it more satisfactory to the business community, the courts and the bar. The final report will take several months for completion."

"Perhaps the chief evil brought out in the inquiry," said Mr. Lloyd K. Garrison, of the staff of Col. William J. Donovan, chief counsel in the investigation, has been the use of the bankruptcy machinery by a number of attorneys for the sole purpose of making fees." Mr. Garrison is further quoted in the Times as follows:

"As a result of the custom whereby the receiver normally retained as his attorney the lawyer for the petitioning creditors there occurred a scramble on the part of lawyers to apply for the appointment of the receiver on behalf of creditors. The first lawyer making the application was appointed attorney for the receiver and later for the trustee, thereby getting fees out of the estate.

"Frequently, the attorney so appointed was brought into the case by the bankrupt's attorney, through friendship or in order to reciprocate for prior favors. Applications for the appointment of receivers, in order to rush them through, were sometimes signed by clerks or stenographers in lawyers' offices on behalf of creditors who at the hearings denied giving any such authority.

"A close connection (even to the extent of sharing offices) has been shown between certain lawyers and collection agencies. The latter were in possession of creditors' lists and would gives the names of creditors to these attorneys for the purpose of filing petitions in bankruptcy and applying for receivers. Election of the trustee was through proxies which were solicited from creditors by lawyers or collection agents whom, in most cases, the creditors did not know.

"As receivers and trustees, with a few notable exceptions, generally left the administration of the estate in the hands of their attorneys, and as the creditors usually failed to take any interest, the result was that from the moment the petition was filed the average administration was entirely in the hands of the lawyer first on the job with his application for a receiver.

"Under such conditions it was inevitable that the investigation would disclose, as it did, numerous other abuses, ranging from general all-around laxity and waste to acts of an apparently criminal nature. The primary purpose of the investigation, however, has not been to pursue individuals but to recommend reforms in administration to cure the evils. With this end in view, an elaborate research program has been conducted from the very beginning, and an attempt has been made to study the problem of administration on a national and an international scale."

The investigation was conducted by Col. William J. Donovan as chief counsel and Mr. George S. Leisure as chief assistant counsel, representing the Bar Association of New York.

Kentucky Association to Push State Bar Measure

UNDETERRED by the indifferent attitude of the General Assembly of 1928, the Kentucky Bar Association is preparing to make a special effort to secure passage of its proposed Bar Organization Act at the 1930 session. At the Association's meeting last April it was unanimously agreed that the bill be resubmitted and that an organization be perfected to create public sentiment. President James Garnett, of the Association, will lead the campaign, and he reports a gratifying interest in the proposal among many business men and others outside of the profession. The bill provides for a managing Board of fourteen commissioners, two to be elected from each of the seven appellate court districts by a majority vote of all the lawyers residing in the respective districts. The Board is to have the usual powers to make rules for the regulation, discipline and disbarment of members, and to investigate complaints. Where it finds that the party complained of should be suspended or disbarred, a copy of the award, together with a statement of the costs incurred in conducting the investigation, must be filed within ten days after same is rendered in the office of the Clerk of the Circuit Court of Franklin County, who shall enter it on the docket for trial. Further procedure is as follows:

"Thereupon summons shall be issued, as in other cases, directed to the party against whom the award shall have been rendered, requiring said party to appear in said Court within the time allowed in ordinary cases and show cause why said award shall not be enforced. If such party fails to appear, judgment shall be rendered by default, which judgment shall include the costs incurred by said Board in conducting said investigation and in the said Court, and the Court shall proceed to enforce same, except as hereinafter provided. If a trial is demanded, the case shall be tried in all respects as now provided by law in actions of disbarment in the Circuit Court, provided that no evidence shall be introduced by either party excepting that heard by the Board, or its committee, unless the Court shall be satisfied by affidavits that the additional evidence could not have been produced before the Board, or its committee, by the exercise of reasonable diligence. Said Court shall enter judgment affirming, modifying or setting aside the award of the Board, including judgment for costs, as aforesaid, or it may, in its discretion, remand

THE WHITE HOUSE
WASHINGTON

September 12, 1929.

Mr. Gurney E. Newlin, President,
American Bar Association,
Los Angeles, California.

My dear Mr. Newlin:

It is with great interest that I note the work which the American Bar Association is doing in disseminating information relative to our National Constitution - its history and purposes.

Familiarity with, and respect for, this greatest of all charters of government among our fellow citizens is essential to our national welfare.

While I understand the Association's work along these lines is carried on throughout the year, it has come to my attention that special emphasis is given to these activities during that week which includes September 17th, designated as "Constitution Day".

You and your associates are rendering a splendid patriotic service in this connection, and I desire to express my appreciation of this service, with the hope that it will be continued with increasing benefit to all concerned.

Yours faithfully,

Herbert Hoover

the case to the Board for further proceedings in conformity with the direction of the Court.

"Either party may take an appeal from the judgment of the Circuit Court to the Court of Appeals, and the procedure on such appeals shall be the same as now provided by law so far as same may be applicable to and not in conflict with the provisions of this act. The Attorney-General of this Commonwealth shall act as attorney for the Board in all such cases both in the Circuit Court and the Court of Appeals."

Adviser to National Commission on Federal Trial Courts Appointed

JUDGE JOSEPH C. HUTCHESON, JR., of Houston, Tex., has been appointed consultant and adviser to the National Commission on Law Observance and Law Enforcement, on the subject of Federal Trial Courts and Their Organization, according to a recent official announcement. He is U. S. judge for the Southern District of Texas and was appointed by President Wilson in April, 1918. A statement issued by the National Commission in this connection says, in part:

Judge Hutcheson's work as Federal judge has brought him in touch with Federal Court business of all kinds and in a number of jurisdictions. In addition to his own district, he has sat as district judge in the other three districts of Texas, in the two Federal districts of Louisiana, and in the U. S. district court in New York City. The cases he has had as visiting judge in these jurisdictions over a period of many years have given him a wide range of experience with the judicial business of the Federal courts in commercial, industrial and rural districts. In the Southern District of Texas, where he sits regularly, the court has a highly diversified body of litigation, including cases relating to immigration, customs, coast guard, admiralty and general commercial cases. His district includes a great part of the Mexican border, and in consequence, he is called upon from time to time to try cases relating to international matters.

"Judge Hutcheson has also sat in the Circuit Court of Appeals of the Fifth Circuit, and will be able to bring to his work with the Commission the experience gained from appellate Federal court work."

"THAT GREAT LITIGATION"

Strictly Legal Aspect of Important Proceedings and Debates that Preceded and Accompanied the American Revolution—The Issue as Formulated by Lord Mansfield—His Complete Reliance on Law and Precedent—Was He Right in Law and Only Wrong in Policy?—The American Arguments

By Marshall Van Winkle
Member of the New Jersey Bar

INCIDENTALLY, but aptly, an eminent writer, in his recent book refers to the American Revolution as "that great litigation." And that is just what it was. There was the assertion of a right on the one side, and a denial of the asserted right, on the other side. Pleadings, of a kind, were drafted; and, in a manner, filed. An issue, of great importance to mankind, was framed. The pleadings set forth legal contentions; and arguments by lawyers, based on law and legal precedents, followed. As the Americans were acting "in defense of the cause of liberty," and were resisting claims made by the British, they may be viewed as the defendants in the litigation. And it may be said that this litigation was decided "according to law," for trial by wager of battle was not abolished by Parliament until 1819.

What, exactly, was the issue? Daniel Webster, speaking in the Senate of the United States in 1834, stated the issue in these words: "Great Britain asserted the right to bind the colonies in all cases whatsoever; and it was precisely on this question that they made the Revolution turn. It was against the recital of an act of Parliament, rather than any suffering under its enactments, that they took up arms. They went to war against a preamble." Lord Mansfield, of counsel for England in this litigation, accurately and clearly defined the issue from the English standpoint, when he declared in Parliament that "the Congress sums up the whole of their grievances in the passage of the Declaratory Act which affects the right of Great Britain to make laws to bind them in all cases whatsoever. This is the true bone of contention. They positively deny the right."

The Stamp Act, a tax act, was repealed because the taxes imposed by it could not be collected except by a kind and an amount of force which Parliament was not then ready to employ. The plan for the repeal —which was decided upon in a secret meeting to which Burke referred in one of his speeches—included the passage of the Declaratory Act, which declared Britain's right to bind the Americans in all cases whatsoever. This Declaratory Act is couched in legal phraseology, as would be expected in a paper drawn by the law-advisers of the Crown; but, more than that, this Act in its plan and scheme shows the imprint of the hands of the British lawyers. A lawyer can easily see that the plan and scheme for the repeal of the one act and the passage of the other came from the brains of lawyers. The Declaratory Act is the kind of paper a lawyer draws for a client who is in trouble, but who has not yet shown his full hand, with the idea that, as the paper accompanies a concession to the other side, its importance may not be noticed; and with the thought that, because the concession is made, the paper will be assented to, or at the least, not presently disputed by the other side. A claimed right that probably cannot be enforced, except at a prohibitive outlay, is given up, and, contemporaneously, an effort is made, as quietly as possible, to preserve or establish the claimed right, or rights including the claimed right, for the future. The Declaratory Act, in the light of subsequent events, may be likened to a lawyer's plan to "put something over on the other side." And the scheme did work to a degree, for the Act seemed to the Americans to only announce an abstract legality. The repeal was followed by unbounded jubilation on this side of the ocean. The New Yorkers put up a statue to the King. Bonfires illumined the American sky; flags were flown; church bells were rung; tons of roast ox and plum pudding were put away; and toasts to the King were drunk, copiously. Poor debtors were set free from prison. The Sons of Liberty ceased to meet. And many folios of fervid addresses of grateful subjects were promptly sent to England. Franklin, who was in London, celebrated by sending his wife a new gown, and also "a fine piece of Pompadour satin of fourteen yards costing eleven shillings a yard." The Americans went down on their knees, in thankfulness to a beneficent sovereign; and there was a great deal of humble language. Then came the Townshend Acts, based, we may say, on the Declaratory Act, or at least supported by it, and the Americans were disillusioned.

When the litigation got under way, the argument that followed on the British side was one of law and precedent; and it was intended to be only that by the British lawyer-statesmen in Parliament who made it. Its hard nature never changed. To the British lawyers their statement of law and precedent seemed to be a complete winning argument. The arguments on the American side were, at first, largely legal; but, afterwards, they became, from the necessities of the case, more what technical lawyers disparagingly call "jury arguments;" and the British lawyers took that tone in dealing with them. The British lawyers talked as if they were addressing a judge sitting alone without a jury; and they stood pat on the law. More and more as the litigation proceeded, the Americans tried "to get to the jury." The British lawyers argued for the letter of the law right through the litigation. The Americans pleaded for the spirit of the law from the beginning. With the British lawyer-statesmen the litigation was just a case at law. Their utterances show that they spoke exclusively as lawyers, and in the undisturbed belief that their side was exclusively the right side—which is the feeling of ordinary law-

yers in ordinary litigations. In the sense in which laymen distinguish between or contrast "law" and "justice," the British lawyers argued for law, and the Americans pleaded for justice.

The first thing a lawyer of today does when he finds himself in a litigation is to look for a precedent; and that is just what the lawyers did in this great litigation. Laymen see, much better than lawyers can, that law precedents are too often used as excuses, and that neither their existence nor their lack should deny justice or impede progress. The training of the British lawyer-statesmen had been too strictly legal to suffer them to even stray into the fields of political speculation. It was but natural for them to evade broad principles, to ignore essential justice, to frown on "the natural rights of man," to deny "the spirit of the law," to which the Americans appealed. With them there was no such thing as elementary political justice unless a statute could be found to cover. They were only lawyers at work on a case. Their speeches were as dry as parchment, and they make dreary reading today. Many of the American arguments, on the other hand, contending for justice as they do, are now found to be lively and attractive, and with a strong appeal in any setting.

Practically all the prominent British lawyers, including Blackstone, who was then in Parliament, were against the Americans, with Lord Camden a shining exception. Lord Chancellor Camden's maiden speech in the Lords, to which Benjamin Franklin listened, was in defense of the Americans, and he was turned down good and proper. He had shown his fearlessness and independence in successfully defending a bookseller charged with libel on the House of Commons. As Chief Justice of the Common Pleas he had stood by stormy John Wilkes in pronouncing illegal the issue of general warrants by the government. He based his argument on precedents. He stood for the common law as it existed when the colonies were younger; and it was to the common law that the Americans so often appealed. Lord North, the King's Minister, sat on the Treasury Bench between his Attorney-General Thurlow and his brow-beating Solicitor-General Wedderburn, big-wigs both, learned in the law; and these lawyers argued just as ordinary lawyers do in ordinary litigations—just as if they were on one side of a case trying to beat the other side. The discussions of these hidebound lawyers rose no higher than that. If it be said that the advice that the British lawyers in official life gave was legally good, one should add that it was thoroughly bad, for it didn't fit the case; and much of the advice that the King got was the kind of advice a lawyer gives to suit a client. There is evidence (in the *Grenville Papers III 374*) that Mansfield himself gave advice of this kind to the King in connection with the Stamp Act, his advice being that the King might and should do an unconstitutional thing.

Grenville, the King's Minister who brought on the Revolution, was a lawyer, narrow-minded and formal. Esme Wingfield-Stratford, in his just-published *History of British Civilization*, tells us that Grenville was "the worst type of pedant thrown up by officialdom, a painstaking bureaucrat, with strong notions of departmental efficiency and a portentous bore" who relied entirely on the letter of the law. Grenville dealt with the Americans only on his understanding of law and legal precedents. For precedents, as authority for his position, he cited the acts of Henry VIII and Charles II. Pitt and Grenville were brothers-in-law, but this relationship had not kept Pitt from mercilessly ridiculing Grenville in Parliament. Pitt, who was not a lawyer, invoked no legal precedents, as such; nor would he discuss any alleged precedent, except in his own way—which was not a lawyer's way. He cared nothing about the rules of the legal game; and going outside a narrow record, so that he might get down to fundamentals, bothered him not at all. He stepped to firm ground, and answered Grenville with a safe general argument when he said—"I would not debate a particular point of law with the gentleman; but I draw my ideas from the vital powers of the British constitution." And he added a jury argument when he said—"I came not here armed at all points with law cases and acts of parliament, with the statutes doubled down in dog's ears, to defend the cause of liberty." The British lawyers never got to a discussion of "the cause of liberty."

Lord Mansfield, the leader on the British side of this litigation, a great lawyer—and that only—swayed the Lords whenever he spoke, just as if he were pronouncing judgment as Lord Chief Justice Mansfield of the King's Bench with unquestioned jurisdiction. He was one of the strongest advocates of the Stamp Act and vehement in opposition to its repeal. His answers to Pitt, whom he feared and detested, had no statesmanlike quality at all—they were fine professional efforts, and that was all. He was deaf to what was said in the Commons, for which body he had small respect, and Burke's admonition "Let us act like statesmen" went entirely unheeded. Mansfield had a strictly legal intellect. He declared that he would speak to the American question "strictly as a matter of right"—the lawyer all over. His decisions that he had delivered as a judge on the power and supremacy of Parliament were so much a part of him that he had become unfitted for discussing the question in terms of expediency. He made no endeavor to find what was just, or what was really best for the Empire, then or ultimately. As he saw it, his was the only way to deal with the question "if there be any true logic in the world." England was legally right. Why pursue the matter further? And the lesser legal lights struck the same note. The larger aspects, the whole question, never came within the narrow compass of the arid arguments of the British lawyer-statesmen. When Mansfield declared in the Lords that "the British legislature, as to the power of making laws, represents the whole British Empire, and has authority to bind any part and every subject without the least distinction, whether such subjects have the right to vote, or whether the law binds places within the realm or without," the law of the matter was really settled as far as the House of Lords was concerned. When the Lord Mayor of London came before Mansfield in a *habeas corpus* proceeding, he remanded the Lord Mayor to the Tower, and explained his action by saying, "This is no new case. I am obliged to go by law and precedent." And this is exactly the way Mansfield felt and spoke when dealing with the American question in the Lords. His speeches in this litigation may be summarized, in his own words, as "law and precedent," as he understood the same. In 1770, Pitt, then Earl Chatham, gave Mansfield the answer the layman usually makes to the lawyer—"My Lords, there is one plain maxim to which I have invariably adhered through life: that in every question in which my liberty or my property were concerned, I should consult and be determined by the dictates of common sense. I distrust the refinements of learning. I am a plain

man." In the same year Junius, in that stinging letter that he addressed to Mansfield, wherein he accused the noble lord of contracting the powers of juries, asked him this question—"Whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect?" James Otis, who was "a madman" to Mansfield, in his pamphlet *The Rights of the British Colonies Asserted* declared that "by the British constitution every man in the dominions is a free man; and no part of his majesty's dominions can be taxed without their consent." Mansfield exclaimed that this pamphlet was "full of wildness"—meaning, of course, that its arguments were not of a legal nature from his point of view. The matter being a litigation only, the pleadings and arguments should be legal and logical, as in all cases in his court. That was all there was to it. And all references to the Supreme Being, the laws of nature, and the spirit of the British constitution, were ruled out as irrelevant.

Three of the British friends of the Americans in Parliament, Pitt, Burke, and Colonel Barre, were not lawyers; and it is fair to say that this accounted primarily for their attitude in this litigation. Neither the citation of legal precedents nor rigid logic determined matters for them. They could see, as the British lawyers could not, that Parliament was dealing with a large question with tremendous implications—not only with a fine legal point. Burke had read law, and he had studied the history of the law; but he was not a lawyer. He knew more than the law; and he could see clearly that his colleagues placed an over emphasis on the law, as they understood it. Burke met the arguments of the British lawyers differently from Pitt. He was willing to admit the British argument that Parliament was supreme—that the British lawyers had a case, legally speaking—but he argued that the controversy should not be decided on narrow legal grounds. At a late stage he summed up the narrow argument against the Americans in these few words—"We have the right to tax America, the noble lord tells us. Therefore, we ought to tax America. This is the profound logic which comprises the whole chain of his reasoning." Some one (whose name the writer does not know, or he would give it) having in mind, no doubt, logic of the kind described by Burke—and, it may be, thinking of Mansfield—said that "logic paralyzes statesmanship." Tagore, the Hindu philosopher, uttered much wisdom for statesmen when he said, "A mind all logic is like a knife all blade; it cuts the hand of him who uses it." We can easily believe that an Oriental said this—it doesn't sound at all like the utterance of an Occidental lawyer of the second half of the Eighteenth century, member of Parliament though he may have been.

Lord Birkenhead, in his *Lives of British Chief Justices* makes this statement about Mansfield's part in this great litigation—"Lord Mansfield was right in law, but profoundly wrong in policy." Certainly—all agree—Lord Mansfield was wrong in policy. But is it so clear that he was right in law?

In 1923 Professor Charles H. McIlwain of Harvard wrote *The American Revolution, a Constitutional Interpretation,* which is devoted to a discussion of the constitutional aspects of this litigation. Professor McIlwain displays material from which a robust argument that the British lawyers were wrong in law easily follows. His book seems to stand quite alone in its contentions; but the writer must add that he has not seen any modern book which exploits material or reasoning from which arises a contrary argument. Professor McIlwain spreads his material before his readers and states his conclusions in a lawyer-like way. His thesis is not, of course, that every legal argument that the Americans put up was good in law, but that a bona fide constitutional issue preceded the Revolution. He estimates the claims of the Americans by the strongest arguments they presented, and not upon weaker or minor considerations, which, as he says "has not always been done and to the detriment alike of the reputation of the Revolutionary statesmen and of the satisfactoriness of some of the modern books." Professor McIlwain's examination supports the American claim that Parliament did not have the right to legislate in any matter for any colony, which precluded all parliamentary taxation. And he concludes with these words —"It is not entirely easy to say with absolute assurance that the British Empire precisely was or was not One Commonwealth in 1774, but I do venture to believe that John Adams's view of this pivotal question of the American Revolution seems somewhat more consonant with all the precedents I have been able to find than the opposing theory supported by Lord Mansfield in the Eighteenth century, and now apparently held by a majority of American historians."

It must be admitted that Lord Birkenhead expresses not only British opinion, but also the opinion of most modern American historians. Some of these historians make short general statements that the Americans were wrong in law, softly and with circumlocution, so as not to offend American "patriots." Others are bolder. Indeed one of them tells the world that the American legal claims were "absurd"; but he leaves us with no specification of satisfactory reasons for his extreme conclusion. Lecky in his *England in the Eighteenth Century* held differently and states the matter fairly—"The constitutional competence of Parliament to tax the colonies is a question of great difficulty upon which the highest legal authorities have been divided, though the decided preponderance of legal opinion has been in favor of the right." (*Vol. 3, p. 315.*) In one book written by an American historian of the highest standing a year or so ago Professor McIlwain's study is noticed only to be respectfully dismissed in a sentence or two with the statement that it doesn't really matter after all whether the Americans were right, because the Revolution was "inevitable." It may not matter, but the question certainly is an interesting one, and especially so to lawyers.

The injured party usually does most of the talking. As the controversy got hotter, the voices of the Americans rose higher. The American indignation bred inconsistent and incoherent arguments. Many of the positions taken by the Americans were untenable in law. But was Otis a madman when he declared that "the sum of my argument is that civil government is from God"? If he meant that civil government ought to be from God, who would gainsay that? And was he far from the truth, if he meant more than that? May it not be said correctly that civil government is from God—mediately? Arguments of this kind solemnized the American contentions, and gave them an inspiring popular appeal. Men in trouble would rather be told that God is on their side than listen to legal arguments made by an army of lawyers in their behalf. But the making of arguments of this kind certainly did not mean that the Americans found that the legal arguments that they made "in the first stage" of the litigation were untenable, whereupon they abandoned them

as no good, and "retreated" to positions based on "the rights of man"—which is about what some American historians either expressly state or clearly imply.

Every effort to get away from the extravagances of the school histories is praiseworthy; but the writer respectfully submits that these historians, in their desire to overrule Bancroft and other earlier American historians, are slopping over. Which one of them has examined the question as thoroughly as Professor McIlwain whose British Parliamentary studies are so well known? Where may we find evidence of any such examination? These historians settle the question for the general reader with a general statement. Isn't this unfair to the general reader? Isn't the general reader entitled to know, at the least, that there was a seriously-controverted constitutional question, and that the arguments of the Americans were something more than vociferous appeals to God and the rights of man? The truth is, as Professor McIlwain points out, that the Americans continued to make their legal arguments up to 1776. Continuously through the litigation the Americans declared or assumed that they were right in law; but to fight for "the cause of liberty," to insist on "the rights of man," to be "a son of liberty," was more inspiring than to repeat legal arguments that had been ridiculed and turned down in England.

Of course many of the American arguments were political; and it would be surprising if this were not so. Were we considering political arguments we would find much evidence showing that the Americans were right. Take, for instance, Lecky: "The Stamp Act did unquestionably infringe upon a principle which the English people at home and abroad have always regarded with peculiar jealousy. The doctrine that taxation and representation are in free nations inseparably connected, that constitutional government is closely connected with the rights of property, and that no people can be legitimately taxed except by themselves or their representatives, lay at the very root of the English concept of political liberty." (*History of England in the Eighteenth Century, Vol. III, p. 353.*) On this phase Professor Randolph Greenfield Adams' *Political Ideas of the American Revolution* (1922) is important and interesting.

Professor Woodburn tells us that "to understand the merits of the controversy over the Stamp Act is to understand the merits of the American Revolution." This understanding may only be important in connection with the history of opinion, but that alone is something worth while. The general reader, he who has read only the histories which have been well-advertised by their publishers as being attractive for the general reader, who has read only for information that came in the easiest way, has not found Professor McIlwain's book in his hands. Apparently it is thought by the general reader—if he has thought about it at all—that an answer to the question of who was right in law in this litigation called only for a consideration of the taxation-representation situation. And this understanding seems to obtain because Pitt's speeches, which stressed this taxation aspect, have held the center of the stage. We must remember—what has usually been overlooked—that Pitt admitted that Parliament could bind the Americans "in all cases whatsoever," except only in matters of taxation. Pitt's arguments on this limitation placed by him on Parliament's power to bind the Americans in all cases whatsoever were the whole of Pitt's arguments, namely, that taxation and representation were inseparable; but the American argument against the claim of "virtual representation" was not the only argument made by the Americans. Pitt's arguments on the taxation aspect have loomed so large in the histories for a century that they have overshadowed the constitutional question which Professor McIlwain has studied, whether Parliament had the right to bind the Americans in any case whatsoever. And this was the real issue, as Webster and Mansfield correctly stated.

John Dickinson, who had his legal education at the Inns of Court, whose *Letters from a Pennsylvania Farmer* have survived as important papers in this litigation, argued that "in government, as well as in religion 'The letter killeth, but the spirit giveth life' "—quoting from a book that lawyers use, even in the practice of their profession. The term "the spirit of the law," as used by the Americans was comprehensive. Apparently it meant, to them, "the law of nature," or "the law of reason," and the common law of England—that these were part of the British constitution, or "engrafted into the constitution." Long before the Revolution Montesquieu wrote that a law that does not conform to the form of government of a country is against the spirit of the law of that country. With the Americans' understanding of the form of Britain's government their appeal to the spirit of the British constitution is easily understood. Lord Bacon, a good legal authority, states in his *Advancement of Learning* that "Declaratory laws should not be enacted except in cases where the law may be retrospected with justice." This may be regarded as a legal principle having to do with the spirit of the law. And in an endeavor to define justice, and to ascertain the spirit of the law, as affecting this litigation, one feels that in a present-day examination he is entitled to look at matters, not alone on the basis of the British thought of the seventeen-seventies. As for justice, are not the principles of justice immutable? Sir Philip Francis' contemporaneous declaration that "the fate of nations must not be tried by forms" may be regarded as an indication of what was meant by the Americans when they argued for "the spirit of the law." In endeavoring to ascertain what was the spirit of the British constitution, as the constitution then existed with relation to representation for purposes of taxation, we remember that the British lawyers of the time admitted that it was a principle of the constitution that no taxes could legally be imposed on Englishmen without their consent given personally or by their representatives. And we know that English historians admit that the doctrine of "virtual representation" which Mansfield upheld, and against which Pitt so magnificently thundered, was "overstrained"—to use the language of one of them. Indeed it was grotesque. The Americans were not represented in Parliament on any basis consistent with any rational theory of government. James Wilson, able American lawyer, in his famous 1775 speech appealed to "the letter and spirit of the British constitution." Years afterwards, in 1850, Seward, a profound constitutional lawyer, speaking in the Senate on the admission of California, feeling that he was pressed to make all his points, stated his culminating point in these words—"There is a higher law than the constitution, which devotes the public domain to freedom." This alone of that great speech is now remembered—it has survived because of its eternal vitality. This "higher law" may be said to be equivalent to "the spirit of the law," to which the Americans appealed. Seward's contention was a formulation of some of the

American Revolutionary contentions, in different words. When the Americans appealed to "the Supreme Judge of the World" they were trying for an adjudication that "the higher law" was in their favor.

But to prove that taxation based on "virtual representation" was opposed to the spirit of the British constitution would not prove that the American were right in law, unless, Lord Camden's argument, which arose in America or was adopted by the Americans, be admitted or proved. Lord Camden, who was regarded as an excellent constitutional lawyer, argued that by the law of nature taxation and representation are inseparable; that this natural law was "engrafted into the British constitution"; that there were some things Parliament could not do. If the Declaratory Act was passed—as its title implies and its preamble and sections indicate—because the Americans denied what the British asserted to be the existing law; if it was passed in an endeavor to clear what was doubtful, and to enforce what was denied; then, it may be said, to begin with, that the very passage of the Act itself raised a presumption in favor of the Americans. It must be remembered that when the British endeavored to tax the Americans they were doing a new thing. Wingfield-Stratford tells us in his recent book, to which the writer has referred, that "it was a gigantic change." It was a departure from ancient custom. And, as Burke argued—"Parliament had not been used to do so from the beginning."

British lawyers were wont to say that Parliament was omnipotent; that it could do anything but make a man a woman, or a woman a man. Otis argued that "Parliament cannot make 2 and 2, 5." Blackstone wrote that Parliament could make a man a judge in his own case; that its power was unlimited. But, surely, no British statesman would argue to that effect today. And may not one say, with correctness, that no British statesman should have argued to that effect in the latter half of the Eighteenth century—that then there were some things that Parliament could not do, legally? If Parliament was supreme in 1766 to such an extent that it could sweep away all rights of person and property by merely enacting a declaratory statute which declared or announced to that effect, or a statute which repealed all prior protective statutes, a statute which abolished Magna Carta and all the safeguards which protected an Englishman's person and property, this could only be on the theory that there was no such thing or principle as "the spirit of the British constitution" which protected an Englishman's person and property. But if the irrepealable law of nature, or law of reason, or "right-law," was a law which protected an Englishman in his person and property, and this law was "engrafted into the British constitution," it would remain operative and protective despite the enactment of the statute. If it survived the enactment of the suppositional statute, with the effect stated, it would be a right "in law." And while the Englishman would be inconvenienced by the enactment of the suppositional statute, he would be legally unaffected by it.

There is such a thing as "the spirit of the British constitution"; and there was such a thing in the second half of the Eighteenth century. British writers do not deny that there is such a thing now existing and potent; but it seems to be mentioned by them only in connection with statements that, while a statute that overrides the spirit of the constitution is unconstitutional, this is so only in the British sense—that such a statute, reprehensible though it might be morally and from every decent human point of view to the last degree, is not a breach of the constitution. Of course the suppositional statute simply could not now be passed. The insurmountable reasons why it could not be passed may be expressed in many ways. Assuming, however, that such a statute were passed, a right of resistance, of revolution, would follow; and this would be a right "in law," under any fair definition, because, while the statute would be wrong in law, the British courts under the British system, would have no right to declare it a breach of the constitution, and revolution would be the only remedy of a free people. This was the situation in the Revolutionary days.

This "spirit of the British constitution" is of wide import; and it was of real significance in the Revolutionary days. Any claimed right of Parliament to override it then, or now, was and is but a theoretical right—only an abstract legality. It may be said that what Parliament dare not do, what it would not do, it really has no right in law to do. Cooley in his *Constitutional Limitations* writes only a sentence on this head—"Parliament has the power to disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully"—but he adds no explication.

Like all matters of the spirit, "the spirit of the British constitution" does not lend itself to easy definition. Perhaps it cannot be defined at all. But a failure or an inability to formulate does not deny the existence of the thing itself or the consequences that follow from its existence. This attempt to state in a few words what the Americans meant in this litigation, when they appealed to "the spirit of the law" may be "wildness"; but let us remember that Tocqueville had so much difficulty with the whole subject that he denied that there was any such thing as a British constitution.

The writer hopes to see this question of the right of Parliament to bind the Americans in any case whatsoever, to which Professor McIlwain addressed himself, stirred more than it has been; and this will happen if Professor McIlwain's book is more widely read. John Adams's legal contentions were not absurd. He is entitled to a square deal, and he has not been getting a square deal of late so far as this legal question is concerned. A reading of Professor McIlwain's book leads a lawyer to think that John Adams's contentions were probably correct in law—that is, that they were supported by precedents; and a reading of Professor Randolph G. Adams' *Political Ideas of the American Revolution* makes one think that the leading Americans in the Revolutionary days knew what they were talking about, and that they were right, or, at the least, very wise, in their political contentions. It may be that with more information many of the next crop of historians will differ from the historians who have written in the past fifteen or twenty years, on this question of who was right in law in this litigation.

For a long time it has been clear to the English people that Washington fought for the rights of Englishmen everywhere; and, fair-minded as the English people are, this is recognized in no grudging way. The Declaratory Act may have been "unsportsmanlike," as Professor Adams says—probably with something of the same thought about the Act that the writer has expressed—but the English people themselves are sportsmanlike. They are good losers. A bust of Washington is in St. Paul's Cathedral as one of the

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ROYAL PURPLE AND SPORTING PINK

Historical and Intimate Relationship of the Law and Fox Hunting — Restrained Tribute to Other Sports—The Old Dominion Judge Who Adjourned Court on Hearing Sounds of the Chase—Present Day Utility of Sport to Harassed Legal Minds

By Robert N. Wilkin
Of the New Philadelphia, O., Bar

As the head of the legal system from which we inherited our common law was the king, so the chief diversion of those devoted to the law was "The Sport of Kings." As R. S. Surtees says, in that classic of the chase, "The Analysis of the Hunting Field": "Hunting is quite the peculiar taste of Britons, and let people say what they will, it must exercise a most beneficial influence on the national character." The history of law and the history of the chase constitute the better, if not the greater part of the history of the English people. At any rate, no one can deny that the tapestry of English history is richly colored with the purple of the law and the crimson of the chase. These two colors are in the warp and woof of English character and represent its independence, its integrity and its virility. Legal purple and sporting pink are so interwoven and blended through the picture of English life that they portray most vividly the two great gifts of the Anglo-Saxon to the world: a noble conception of sport and sportsmanlike conception of law.

The hunting Squires have long been looked upon as the very vertebrae of the English social organization. In them the law and the sports met. The true Squire in his own bailiwick was the embodiment of the law and the leader in natural recreations. To quote again from Surtees: "In spite of all its misapplications—in spite of all the gibes and jeers levelled at the class, there is still something about the title 'Esquire', or 'Squire', peculiarly grateful to Englishmen, and peculiarly expressive of the tranquil simplicity of country life. Strictly speaking, we believe the title of Esquire is the prerogative of parties named in her Majesty's commission of the peace, of members of certain professions and callings [notably the law], but there is no doubt that its real working identity is the lord of the soil, the country resident—the country justice, if you will, but the *follower of field sports*, at all events. This is the sort of being that the title 'Esquire' suggests to the minds of Englishmen, and this is the sort of 'Squire' that the country people look up to as the highest authority within the scope of their imaginations."

True, these Squires were not all lawyers. But they were a part of the organization for the administration of justice; and they were the stuff from which many good lawyers were made. And that the earliest lawyers of the realm had a love of the chase in their blood is proved by "The Story of the Inns of Court." The young lawyers were not content with hunting rabbits in the "coney garth"; they had "Hunting Nights" when a fox was set free within the confines of the Inn. It was pursued by hounds and Outer Barristers, and Chancery Lane resounded to the cries of the chase. A perverted form of the sport, no doubt—occasioned by the congested life at the Inns and the hot blood of youth—but it proves that the inclination to chase the fox was present at the very inception of our profession.

And wherever English colonists located, they continued to follow the chase, though their method of hunting was frequently altered to meet changed conditions of life. Wherever the English tongue was wagged, the tongue of hounds was heard. Our pioneer ancestors brought hounds to the new world. They fought Indians, cleared forests, built Houses of God and Temples of Justice, established liberty and order—and chased the fox for diversion. George Washington was not only the Father of Our Country; he was also a champion of the chase. It is generally known that he was capable of riding "hell for leather," but it is not so generally known that he was a breeder of foxhounds. If the "hounds of Washington" are today a doggone poor pack, it is not because the General did not start the country right. It is because we have digressed too far from the genuine recreations of life.

"Your orator" in the first case on the docket of "neglected relationships," the Fisherman, true to his breed, was not at all modest about proclaiming his prowess with hook and line. But the fox-hunting breed is proverbially more reticent. Beckford, one of England's great Masters of Fox Hounds, after reciting the principal virtues of a Huntsman, concludes thus: "he should be quiet, patient, and without conceit. Such are the excellencies which constitute a good huntsman; he should not, however, be too fond of displaying them, till necessity calls them forth." And it is an axiom of foxhunters that "yarn spinning is only for harehunters." But without any affectation of modesty, your orator for the chase must state that he is neither a Master, a Huntsman, nor a Whipper-in. The plain truth is that when he was in finest fettle he was proud to qualify for a humble place in the Field. He speaks not by virtue of any excellencies, but out of love for the sport.

I have read with sympathetic interest what has been said of other forms of diversion. I have myself played golf, motored, fished and hunted with gun. I agree heartily with all that is said in praise

of other recreations. But for real diversion and recreation — for self-absorbing rejuvenation — for a blood-tingling, soul-stirring thrill—nothing excels the chase. I am somewhat like the witness whom Harry Worcester Smith, formerly Master of the Westmeath Hunt in Ireland, tells about in his delightful "Sporting Tour":

"At another Police Court in Cork the witness, after being sworn in, was asked, 'Do you corroborate what the previous witnesses have said?' His answer was, 'Yes, I do. They are all liars'."

An Ohio Lawyer Who Followed His Hounds to Virginia, Where Hunting Is More Favored

There is no doubt that one of the very strongest appeals that can be made to the mind of man or beast is made by the chase. The sound of hounds "in full cry ahead" is irresistible to the responsive heart. It stirs primitive emotions and unites man and horse and hound in a common pursuit. A hound will break his leash, a hunting horse will break his tether, and a huntsman will break his neck to respond to the call.

Unfortunately there are people who are unresponsive, just as there are some breeds of horses and dogs that are unresponsive. If such a person has not been trained in his youth, he is hopeless in full age. This fact is illustrated by the old story of the fox hunter who took his unresponsive friend out to teach him the joy of the chase. They stood on a hilltop and waited for the pack to bring the fox past them. At last the hunter heard the hounds in the distance and said to his friend, "Do you hear that heavenly music?" No response. Soon the valley beneath was in full reverberation and billows of sound rolled up to them. The hunter waved his arms and jumped with glee, and, turning to his friend again asked, "Don't you hear that heavenly music?" The friend unmoved replied, "I can't hear anything for the damn barking of those dogs." Such a man is helpless and hopeless—to speak of hounds giving tongue as barking dogs! Let him be taken back to the mill or the mine to work, and beguile his idle hours with commercialized and enervating movies. He has no capacity for real life—let him be entertained with pictures of make-believe.

I am indebted to Ex-Governor Montague of Virginia for the account of an incident which shows the appeal of the chase to a certain judge of the Old Dominion. The Ex-Governor says his father had gone to some neighboring county to present a matter pending in the county court. As is often the case in the South, the courthouse was located in the country without much of a town or settlement about it, and a strip of woodland came down to a point very near. The courtroom was on the first floor and had large windows with very low sills. The weather was not cold and the windows were open. While Mr. Montague was making his argument in the afternoon, he observed that the judge's attention was being diverted. The judge would lean toward the open window and listen. Soon Mr. Montague heard the baying of hounds in the nearby wood. The judge in nervous haste begged the pardon of counsel for interrupting, said the case could not be finished that afternoon, that he heard the hounds in a merry chase, and, as he uttered the words, "Bailiff, adjourn court till nine o'clock tomorrow morning," he seized his hat, went out through the open window, and disappeared in the wood.

An incident in my own experience—wherein a judge was deserted by his horse—will illustrate the appeal of the chase to the animal mind. In the first years of my practice I owned a hunting horse which had been thoroughly trained to the chase in Pennsylvania. Glenmore was his name. He was also broken to harness. I had frequently driven him and found him a very satisfactory road horse. One day my father, wishing to go to the country, drove Glenmore. He tied the horse to a fence at the top of a hill while he walked across fields to his destination. When he returned, he found the buggy pulled up into the fence; the shafts were broken; parts of torn harness remained, but Glenmore was gone. My father borrowed a horse and pair of shafts from a neighboring farmer in order to drive home. It was then my duty to return the borrowed property and retrieve Glenmore and the wreckage. I found Glenmore along the road at the edge of town—sweated but gentle as a lamb. I had a strong supposition as to what had happened. And when I took the borrowed horse back to the farmer, my supposition was confirmed. The farmer said: "While that horse was tied up there, some hounds chased a fox out across that hill. You don't reckon that scared the horse, do you?" I said, "I reckon not." But what I was reckoning in my own mind, was the strength of the appeal of the chase. Glenmore could not be stayed, though tethered by one who represented the stability of the law of the land.

Hunting has always been much more of a social institution in England than in America. There are more permanently established hunts there than

here. Some of them are maintained privately by wealthy sportsmen or noblemen, though I think they are coming to be supported more and more by general subscription. Some of the wealthy country clubs of this country maintain a kennel and a Master of Hounds. Virginia is more given to the sport than any other state. Although I had chased fox from boyhood, the first red coats and white breeches that I had ever seen, I saw while studying law at the University of Virginia. And now that Farmington is opened as a country club, a stud and kennels for the special use of students of the University is maintained. And I am informed that a student sometimes bears the honored title, M. F. H. I rejoice that a school exists where the blood of the youth may developed in purple and red.

(I did not study under Professor John B. Minor, who, the Fisherman says, pronounced an inhibition against piscatory pleasures, but his nephew, the honored and beloved Dean Lile, taught the youth of my time that the first day of the quail-shooting season was a good cause for continuance of a case.)

But one need not deny oneself all the pleasure of the chase because one's community does not support an established hunt with master, huntsman and regular fixtures. No doubt the sport is best when riding to hounds in good company; but a lot of fun and recreation can be had by one man afoot, if he has a hound and there is a fox in his county. For the last few years, some of the lawyers of my county (which has become unsuitable for cross-country riding) have assembled about once a week during the winter and early spring near Eagle Hill and have hunted with a small pack of hounds which is kept nearby. Last spring we never failed to have an exciting chase and often "made the ploughman pause with attentive ear." And how a brisk chase on a cool day will sweep the legal entanglements out of a lawyer's brain—"and how!" Of course we could not follow the hounds, but, by moving from place to place on the hills, we could see the chase pass repeatedly, and would frequently see the fox and observe its behavior while being chased. If the chase is in a man's blood, he will enjoy it in the best form available—but in some form he must have it. The English poet, Siegfried Sassoon, in his recent contribution to the literature of the chase, "Memoirs of a Fox-Hunting Man," quotes his friend Stephen as saying he'd "sooner cheer a pack of Pomeranians after a weasel from a bath chair than waste his life making money in a blinking office."

But wherever possible, the horse should be used. One of the most attractive features of the sport is the association and cooperation with both dog and horse. And while I do not like to mention the matter of health in support of a sport, yet, if it is to be considered, it should be considered in this connection. I do not like the idea of taking my recreation like medicine. As a true artist believes in "art for art's sake," so I believe in sport. But since health has been mentioned, let me quote two ancient proverbs:

"There is nothing so good for the inside of a man as the outside of a horse."

"There is more virtue in a saddle than in the whole *materia medica*."

That these proverbs are true is shown by the number of men of advanced years who are still enjoying the sport. I know three men well past seventy who are still riding and hunting hard. And Sassoon's Memoirs bear testimony to this:

"But are there still such veterans as those who went so well when I was there to watch them? Grey-bearded Squire Wingfield was over seventy, but he took the fences as they came and held his own with many a would-be thruster forty years younger. And there were two or three contemporaries of his who got over the country in a way which I remember with astonishment. Compared with such anno domini defying old birds, jolly Judge Burgess (who came from London as often as his grave duties permitted) was a mere schoolboy. The Judge had returned to the hunting-field at the age of fifty, after thirty years' absence, and he had evidently made up his mind to enjoy every minutes of it as he bucketed along on a hollow-backed chestnut who, he affirmed, knew a dashed sight more about hunting than his learned owner."

How much more jolly some of our judges would be if they could experience the thrill of a ride to hounds! But I can almost hear them parry the suggestion with some remark about the proprieties of their position. I have always had a faint suspicion that there is a bit of diffidence hiding behind the dignity of the bench and a deal of lethargy under the judicial gown. The constant deference paid to "His Honor" exalts him over-much. A shaking down in the saddle would do him good. And even a fall would serve to bring him to earth. And such an experience would not mar the happiness of the hunt:

"No; the wild bliss of nature needs alloy!
And falls and tumbles fan the fire of joy!"

While I hesitate to mention health as a cause or excuse for sport, I do not hesitate to say—indeed I should be remiss if I delayed to proclaim—that hunting is one of the best of all worldly pursuits to create and maintain a high spirit for life. It creates determination and patience, courage and fortitude. As Surtees says: "The fox hunter goes out to 'fresh fields and pastures new' . . . His mind's enlarged, his spirits raised, his body refreshed, and he comes back full of life and animation. If he has had a good run, and been carried to his liking, his harvest-moon heart loves all the world."

The trouble with our modern civilization is that it takes us too far away from primitive pleasures. It is too artificial—and hence the unrest. We are too dependent upon professional entertainers. We will pay for a thrill, but we have not the diligence to amuse ourselves. We lack the initiative and courage to follow the sports that teach us to "live dangerously and die valorously." If the legal profession is to exercise properly the leadership which it has flattered itself into assuming, it will do well to lead the way back to the open fields and wooded hills and encourage the indigenous sports. I am told that there is an organization in our land which has for its object the enactment of laws forbidding the chase; and that, stimulated by an over-refined sympathy for the fox, it is very active. Let

the true descendants of the makers of Magna Charta, under the purple of the law and the red of the hunt, again stand together and oppose such maudlin sentimentality. Let them favor rather all such laws as will protect the fox for the purposes of the chase, and also such laws as will extend and preserve the huntsman's ancient privilege of "trespass by courtesy."

"Yet if once we efface the joys of the chase
From the land, and out-root the stud,
Goodbye to the Anglo-Saxon race!
Farewell to the Norman blood."

THE SUPREME COURT ON ACCOUNTING METHODS

Early Influence of Popular Conception of Income on Court's Decisions—Later Recognition of Scientific Accounting Principles in Determination of Income for Tax Purposes—Progress in Acceptance of Accountant's View Regarding Deductions, etc.

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IN 1894 it became evident that sooner or later the sovereign government would have to tap another source of revenue to meet the growing need for expenditures. The Revenue Act of that year attempted to levy a tax on incomes. This was not entirely a novel idea inasmuch as this method of raising revenues had been employed during the Civil War as a temporary war measure, but in 1894 it was proposed to tax incomes as part of the regular fiscal policy of the government. Inasmuch as the country was not at war at the time, there was a loud and effective protest against such a tax. The United States Supreme Court heard the protest and in one of its famous five to four decisions[1] the act was declared unconstitutional.

The need for raising additional revenues did not end with that decision, however, nor did the cry that incomes should be the source of such revenues abate. The next attempt to tax incomes was made in 1909, when under the guise of a "special excise tax," the Corporation Excise Tax was enacted. The constitutionality of this act was upheld.[2]

The popular conception of income as being money actually received and not merely expected to be received in the future had up to this time been reflected in decisions of the court[3] and so the Act of 1909 in levying the excise tax on incomes did so on the basis of cash receipts and disbursements. In the administration of the tax act, the Treasury Department very early felt the influence of sounder accounting principles towards acceptance of the concept of accrued income. Courts however did not lend themselves so readily to a scientific analysis of income partly because the layman's idea was workable and partly also because they did not feel that a tax on incomes was to be a permanent feature of the fiscal policy of the government and so best administered along scientific lines. In a case[4] arising under the Act of 1909 where the Revenue Bureau attempted to tax income calculated on the accrual method, the court held that income meant that which had "come in" or had already been received and not that which might have come in but did not. The "revenue basis" (accrual method) the court said was necessarily open to speculation and uncertainty.

In Maryland Casualty Co. v. U. S.[5] the court says, "The word income has a settled legal meaning. The courts have uniformly construed it to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid." In United States v. Schillinger[6] the conception of income as money is stated in these words, "In the absence of any special law to the contrary, income must be taken to mean money, and not the expectation of receiving it or the right to receive it at a future time."

In approving a popular rather than a scientific method of calculating income the court in Mutual Benefit Life Ins. Co. v. Herold[7] says, "The cash plan in a series of years would disclose and subject to taxation everything received by a company." In marking the strides toward sounder tax policies that were made in subsequent revenue measures, one further sentence from this court's decision is noteworthy. The court says, "It seems to border upon *absurdity* (sic!) to speak of income as including that which has not been received, and which in the ordinary uncertainties of business may never be received."

If the laws subjecting incomes to taxation were to be administered satisfactorily, the narrow popular conception of income had to be modified, because it is just as important to determine when income is to be taxed as how much is to be taxed. The direction in which the modifications were to be made had to be indicated first by the economist and second by the accountant. The economist sets up a scientific definition of income as the flow of benefits derived from wealth over a period of time. These benefits are customarily measured in terms of money, but they need not be. Professor Robert Murray Haig has defined income as "the money value of the net accretion to one's economic power between two points of time."[8]

Accountants have attempted as a practical matter to measure the benefits derived from wealth or the accretion to one's economic power. Other than to employ the idea of accrued income not yet reduced to

1. Pollack v. Farmers Loan & Trust Co., 158 U. S. 601 (1895).
2. Flint v. Stone Tracy Co., 220 U. S. 107.
3. U. S. v. Schillinger, 14 Blatchford 71 (1876).
4. Mutual Benefit Life Insurance Co. v. Herold, 198 F. 199 (1912).
5. 52 Ct. Cl. 201 (1917) modified and affirmed, 251 U. S. 342 (1920).
6. See note 3 supra.
7. See note 4 supra.
8. Federal Income Tax, Columbia University Lectures, edited by R. M. Haig, pp. 7, 23.

cash, they have been most conservative in approaching the economist's viewpoint. However, the accountant's influence has been increasingly felt in succeeding Revenue measures.

The essential difference between the cash basis of calculating income and the accrual method is expressed by Esquerré[9] as follows: "This method (accrual basis) applies the accounting principle that the primary connection between the net assets and the net income derived therefrom, is a matter of earnings and of expense *incurred,* and not one of income received in cash and expenses paid in cash. . . The adoption of the accrual basis means that at the end of every accounting period, all income which has been earned during that period must be recorded as an accrued asset which, while perhaps not collected at the time, because it is not due, may be collected at some future time. This of course, necessitates the recording of an income which will be credited to the profit and loss of the period, whether or not the accrued asset which it represents fails of collection. Thus, if the last interest receivable on investments in bonds was received December 1st and the accounting period ends December 31st, there has been earned interest for one month, which is an asset of the investor as well as it is his income for the month of December." Professor Roy B. Kester[10] puts it more tersely: "To show all earnings in the period in which they actually accrue is called the accrual method. Under this method the income earned but not received during the current period is set up among the assets."

The court in a recent case[11] was asked to determine when a deduction should be made for taxes paid on profits resulting from munitions manufactured and sold in 1916, where the books were kept on an accrual basis and the tax was payable in 1917. The court defined cash basis as follows: "In order to keep books on the basis of actual receipts and disbursements, credits yet to become due or obligations yet to be paid, would have to be ignored." Of the accrual basis, the court said, "The books are kept on an accrual basis whenever entries are made of credits and debits as the liability arises, whether then received or disbursed." Dr. Klein says[12] of the accrual basis: "In general, the accrual basis more nearly reflects true income because it gives effect to sales and other accruals of income in the year when the business is really done and not when the results thereof are collected."

It was stated above that the Excise Act of 1909 contemplated income on the basis of cash receipts and disbursements only and courts at first refused to accept any other basis. The Revenue Bureau however found it more logical and more scientific to administer the law in accordance with accounting principles. Nevertheless the Revenue Acts of 1913, 1916 and 1917 said nothing about adopting sound accounting practice in determining income and it may be inferred that the expressed attitude of Congress toward income was the popular conception. The 1916 Act[13] did allow the option of reporting income on the basis upon which the accounts were kept, but the permission of the Commissioner had first to be obtained. It was not until the Revenue Act of 1918 was passed that Congress accepted the Revenue Bureau's interpretations of the statutes, which were in the direction of sound accounting practice. The use of the bookkeeping basis was made mandatory. The Act gave official recognition to the accountant in the following words:[14] "The net income shall be computed . . . in accordance with the methods of accounting regularly employed in keeping the books of . . . taxpayer." The same language is contained in all succeeding Acts.[15] Finally the Supreme Court itself[16] gives recognition to scientific accounting principles as the basis of determining income for tax purposes in the following clear statement: "A consideration of the difficulties involved in the preparation of an income account on a strict basis of receipts and disbursements . . . which had been experienced in the application of the Acts of 1909 and 1913 and which made it necessary to authorize by departmental regulation, a method . . . not in terms provided for by those statutes indicates the purpose of sections 12 (a) and 13 (d) of the Act of 1916. *It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles,* by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period."

Courts unfortunately have not adhered to the logical implication of the acceptance of scientific accounting principles. In a most important case[17] the court says, "We require only a clear definition of the term 'income' as used in *common speech,* in order to determine its meaning." The determination of when income arises requires, however, more technical consideration. The result is that the decisions of the court and for that matter the rulings of the department also have not yet reached the point where they are consistent with sound accounting practice. So far as the Act of 1928 is concerned, sound accounting practice[18] has been recognized, with some modification, if this will clearly reflect income. Article 322 of Regulation 74 puts it this way: "Approved methods of accounting will ordinarily be regarded as clearly reflecting income." The same article says that where it is necessary to use an inventory, only the accrual method will correctly reflect income. In spite of the recognition given to the concept of accruals in principle, the word has not yet been standardized. In a Board of Tax Appeals case[19] the Board says, "The word 'accrue' has no definite meaning but must be interpreted in accordance with the statutory requirements that the accounts must clearly reflect income."

While the Revenue Bureau has been responsible in a large measure for adopting sound accounting practice in determining income, it has seemed unwilling to follow accounting principles consistently. For this reason it is repeatedly coming into conflict with the courts. Out of this conflict should come a full fledged sanction of sound accounting practice. At present each new issue must often await a decision of the highest court before the taxpayer can be sure that sound accounting principles are also sound when applied to tax laws.

How recent decisions reflect the progress that has been made, it will now be our purpose to point out, and our attention will be directed first to several problems involving the nature of income.

In U. S. v. Oregon-Washington Railroad and Navigation Co.[20] the court held that the cancellation

9. Applied Theory of Accounts, pp. 300, 301.
10. Accounting Theory & Practice, Vol. II, p. 249.
11. Aluminum Castings Co. v. Routzahn, 24 Fed. (2d) 230 (1927). Affirmed on April 2, 1929, by U. S. Circuit Court of Appeals, Sixth Circuit, No. 5134.
12. Federal Income Taxation, p. 108, Par. 6:9 (c).
13. Sec. 8 (g) and 13 (d).
14. Sec. 212 (b).
15. Sec. 212(b) in 1921, 1924 and 1926 Acts. Sec. 41 in 1928 Act.
16. U. S. v. Anderson et al, 269 U. S. 422.
17. Eisner v. Macomber, 252 U. S. 189 (1920).
18. Sec. 41; Sec. 42; Sec. 43; Sec. 48; Reg. 74, Art. 322, Art. 323.
19. Ernest M. Bull, 7 B. T. A. 993.
20. 251 Fed. 211 (1918).

of a debt due from a corporation to its sole stockholder at the time when the corporation had just commenced business was a capital contribution and not income. In another case[21] a debt was cancelled by a payment in foreign currency bought for much less than the value of the foreign money at the time the debt was incurred, due to a fall in exchange. The court held that the difference was not taxable income to the debtor. The court in this case was undoubtedly influenced by the fact that the money originally borrowed had been lost and the total loss only had been diminished by the gain due to the fall in exchange. Unquestionably, the accountant would consider the cancellation of a debt as a type of income to the debtor and clearly this constitutes also economic income. When measured by sound accounting principles the decisions in the above cases are incorrect.

In the Kerbaugh Empire Co. case the lower court[22] held that where a creditor cancels a debt due from a debtor in whole or in part, the debtor realizes no income. The department has held[23] that the discharge of a debtor from his obligation in whole or in part does not constitute taxable income where the discharge results from bankruptcy proceedings or composition agreements, but[24] where the creditor reduces the debt by accepting less than the full amount, taxable income to the debtor results.

The holding in the Kerbaugh Empire Co. case[25] has been responsible for conflicting views with respect to the treatment of bonds issued at a discount or a premium. The department holds[26] that retirement of bonds for less then the issued price gives rise to income and if bonds are retired at a price in excess of the issued price, a deductible loss results. The view of the Board of Tax Appeals[27] is in direct conflict. In Independent Brewing Company, the Board held that such transactions do not result in income. In an opinion, unsound on grounds of sound accounting and also for its dependence on Kerbaugh Empire Co. v. Bowers, the Board says, "In our opinion taxpayer derived no taxable income from the purchase of its own bonds at less than the issue price. Certainly the transaction was not analagous to a short sale. The facts are simply that during the taxable year the taxpayer used a portion of its cash to pay a portion of its debts. Whether it will ever be able to pay the balance of them is uncertain. We think the principle laid down by the court in Bowers v. Kerbaugh Empire Co. is controlling here."

The application of principles of sound accounting received a setback in the decision of Old Colony Railroad Co.[28] Bonds were issued at a premium prior to the taxable year. Based upon the life of the bonds, the Commissioner included a pro rata portion of such premium as income. It was held that "at most it is a matter of accounting and cannot give rise to income where no transaction has occurred during the taxable year with reference to the sale, purchase, or payment of the bonds." This statement attacks the validity of the entire concept of accrual whether it be of income or deductions. In this case the Board followed the decisions[29] of the court in several cases disallowing as a deduction from income amortization of bond discount. On appeal the Circuit Court[30] agreed with the Board although the amortization of the premium was required by the Interstate Commerce Commission. The bonds in the Old Colony case had been issued between 1895 and 1904 at a time when there were no federal statutes taxing incomes and prior to the adoption of the 16th Amendment, but the soundness of the method employed by accountants for treating premiums on bonds is not dependent upon taxing statutes. The decision in the Old Colony case denies the validity of Article 68 of the Regulations.

To the accountant the issuance and redemption of a bond is not a capital transaction, but is rather equivalent to a loan and repayment. The discount or premium element in the sale of a bond is considered by accountants as a factor affecting the interest yield or charge. This the department has recognized but neither the Board nor the Courts have been able to view the problem in the light of scientific accounting principles. The courts have been consistent in their point of view and just as they will not permit the inclusion of a portion of premium as taxable income, so they will not allow a purchaser of bonds to amortize a premium paid on the purchase and deduct the amortized amount from gross income. The court said in N. Y. Life Ins. Co. v Edwards[31] that no deduction could be made unless there was a loss "actually sustained within the year. All the securities might have been sold thereafter above cost. The result of the venture could not be known until they were either sold or paid off."

The income of railroads from earnings while under Federal control presented an interesting problem for the accountant and the courts. Where books were kept on an accrual basis the department ruled[32] that the amount of compensation finally certified by the Interstate Commerce Commission was income for each of the accounting periods for which compensation was allowed, although not received until a later date, and that compensation allowed in excess of such certification in the final settlement should be considered as income for the year in which the agreement as to the amount of additional compensation was reached. In Appeal of New Orleans, Texas & Mexico Railway Co.[33] the taxpayer not having executed the just compensation agreement filed an application for compensation in excess of the standard return. A final settlement with the Director General of Railroads was not made until July 29, 1921 when the annual compensation to be paid taxpayer was agreed upon at $1,500,000. In filing its tax return for the year 1918 taxpayer had accrued $1,101,215.32, this amount being the so called standard return originally certified to by the Interstate Commerce Commission. The Commissioner attempted to include the difference of about $400,000.00 as income for 1921, against the contention of taxpayer that this should be included in the income for 1918. The Board upheld the contention of the taxpayer in this case, thus overruling the department.[34] Montgomery[35] does not consider it a sound principle to take up as income amounts that can be collected only by suit and in

21. Kerbaugh Empire Co. v. Bowers, 271 U. S. 170.
22. 300 Fed. 938.
23. I. T. 1564, C. B. II, 1p. 59, also S. M. 1495, C. B. III-I, p. 108 and Reg. 74 Art. 64.
24. I. T. 1547, C. B. II—1 p. 58.
25. See note 22 supra.
26. Reg. 74 Art. 68 (1) (b) & (c) and A. R. R. 545 C. B. No. 5, pp. 211-217.
27. Independent Brewing Co. 4 B. T. A. 870 (1926); National Sugar Mfg. Co. 7 B. T. A. 577 (1927).
28. 6 B. T. A. 1025 (1927).
29. Baldwin Locomotive Works v. McCoach, 221 Fed. 59. Chicago & Alton R. R. Co. v. U. S., 53 Ct. Cls. 41.
30. Commissioner of Internal Rev. v. Old Colony R. R., 26 F. (2d) 408.
31. 271 U. S. 109 (1926).
32. S. M. 4171 C. B. IV-2 Dec. 1925, p. 147.
33. 6 B. T. A. 437 (1927).
34. See note 32 supra.
35. 1927 Income Tax Procedure, p. 280.

connection with another case[36] similarly decided by the Board he says the decision is "an extreme and technical application of the accrual method of accounting." It is submitted that uncertainty of amount should not prevent accrual either of income or deductions as long as some liability is admitted and the dispute is merely as to the amount.

How the courts will ultimately determine the issue is uncertain, although in U. S. v Pittsburg & West Virginia Railway[37] the Court held that the 2% tax on net income for which the Director General of Railroads was liable was payable by the railroad taxpayer in a case where final settlement of the just compensation due was delayed until a time subsequent to the period of Federal control. The Court here agreed with the Commissioner in considering the compensation as income for the year in which received.

The taxability of dividends to stockholders is determined by considering the legal situation. The stockholder has no claim on the corporate earnings out of which a dividend is to be paid until the dividend has been declared by the directors. In the famous Dodge case[38] a suit was instituted by stockholders to compel the distribution of a dividend. The decree of the lower court was rendered on December 5, 1917 ordering the directors to make a distribution of 50% of the surplus. The case went up on appeal and the decision of the lower court was confirmed in 1919. The directors in obedience to the order of the court made a distribution on July 10, 1919 of 50% of the surplus with interest from December 5, 1917. Until the directors declared the dividend there was nothing set aside for stockholders or made absolutely available to them, and so it was correctly held that there was no income to the stockholders until 1919 when the directors made the distribution.

In this case the books of the stockholders were kept on a cash basis, but the result would have been just the same if they had kept their books on an accrual basis because no dividend accrues to the stockholder until it has been duly declared by the directors of the corporation. Here the liability of the corporation for the dividend was not fixed until 1919. In another case[39] arising out of the original stockholders' suit against the Ford Motor Co., the court again emphasized its decision in the Dodge case by holding that a dividend actually paid and received by a stockholder in 1919 was taxable as income for that year, although the dividend should have been paid in a prior year according to the decision of the state court resulting from the litigation. Furthermore, the decree of the court directing payment of a dividend could not be construed as a distribution made by a corporation.

In Ferguson v Forstmann[40] a corporation declared dividends in 1919 and 1920. As a result of some litigation between one of the stockholders and the Alien Property Custodian, the dividends were impounded under a court order and were retained in the treasury of the corporation. The stockholder ultimately received the income in 1921. The court held that the action of the Alien Property Custodian had really made the corporation a fiduciary, and as such the corporation was taxable on the dividend for the years when they were declared, on the principle that the dividends were income accumulated in trust for an unascertained person. But for this peculiar twist to the problem there would have been a nice question for the courts to decide. How the courts would have determined the issue is problematical although it is the opinion of the writer that on a cash basis, taxpayer should report the income for 1921. It could not be considered as income for 1919 and 1920 under the doctrine of constructive receipt for the reason that the causes of the delay were not within the stockholder's control. On an accrual basis stockholder could consider this as income for 1919 and 1920.

Unpaid obligations which become outlawed and are written off, constitute income of the debtor for the year in which written off. This was the holding in Great Northern Railway Co. v Lynch[41] where unpaid obligations accruing prior to 1909 were carried on the books until they became outlawed.

From the discussion thus far of the courts' attitude toward the acceptance of sound accounting principles, it is clear that progress has been decidedly slow and in several instances most unsatisfactory. This is undoubtedly due to the old legal concept of income as cash only and to the fact also that the taxation of income is limited by the constitutional provisions[42] against laying direct taxes, which provisions though apparently enlarged by the 16th Amendment, were in fact reinstated in the restricted interpretation given to the 16th Amendment by the Supreme Court in Brushaber v Union Pacific R. R. Co.[43] No such difficulties beset the courts in determining allowable deductions and so in the discussion of the courts' acceptance of accounting principles in relation to items of deductions, greater progress has been made in recognizing the accountant's point of view.

The courts have had no difficulty with respect to the allowance of business expenses accrued, except in the case of extra compensation. In the recent decision in Ox Fibre Brush Co. v Blair, Commissioner,[44] accounting principles were apparently disregarded. The case reversed the Board of Tax Appeals on the proposition that extra compensation for past services are deductible in prior years and not for the year when the directors voted the extra compensation where books are on an accrual basis. $48,000.00 was voted in 1920 by the directors as extra compensation for past services rendered by the president and treasurer of the corporation. The court held that the amount could not be accrued on the books until the compensation had been voted and this was in 1920. That liability was not fixed until then. The court attempts to distinguish the case from United States v Anderson[45] by saying that expenses of this kind are not to be confused with taxes. The court draws a distinction also between the present case and W. S. Bogle & Co. v Commissioner.[46] In the latter case the court refused to allow a deduction for salary payment made to a corporation's president as compensation for previous years. The court in the present case is of the opinion that the additional compensation in W. S. Bogle & Co. v Commissioner rendered the total salary unreasonable. The case is noteworthy also as an indication of the efforts of courts still occasionally made to retard the progress of accounting principles and standards in influencing sound taxing measures. The court speaks of "rigid rules of

36. Illinois Terminal Co. 5 B. T. A. 15.
37. 271 U. S. 310 (1925) reversing 6 Ct. Cls. 11.
38. Dodge v. U. S., 64 Ct. Cl. 178.
39. Kales v. Woodworth, 20 F. (2d) 395. Affirmed by the C. C. of A. for the 6th Circuit, May, 1929.
40. 26 Fed. (2d) 47.
41. 292 Fed. 903.
42. Art. 1, Sec. 2, Clause 3.
43. 240 U. S. 1.
44. U. S. Circuit Court of Appeals, 4th Circuit, No. 2753, decided April 9, 1929.
45. Infra.
46. 26 F. (2d) 771.

accounting" that must not be "allowed to supplant that reasonable amount of flexibility which must from the very nature of things go hand in hand with the vicissitudes of business . . ."

With respect to deductions for such items as cash discounts and reserves for contingent liabilities, the attitude of the Commissioner and the Board of Tax Appeals has been strongly opposed to sound accounting principles. The Commissioner has ruled[47] that "where a liability is not to be incurred until the happening of some contingency, such contingency must happen before there is, of course, a liability actually incurred, and prior to such time no amounts can properly be accrued in respect thereof for income tax purposes." The Board of Tax Appeals[48] has expressed itself to the same effect. "A liability accrues in the year in which demand for payment may be and is lawfully made." The Commissioner[49] and the Board[50] have spoken positively on the subject of cash discounts. "A corporation keeping its accounts on an accrual basis will not be permitted to deduct from gross income a sum in anticipation of the amount the corporation may be required to allow as cash discount on accounts due and payable in the succeeding year."

While there has been no adjudication in the Supreme Court on this aspect of accounting principles, it is quite unlikely that the principle of deducting cash discounts and reserves for contingent liabilities, which represents good conservative accounting, will be accepted by the courts. The accounting principle is in absolute conflict with the legal attitude towards a contingent liability. It took a change in the law for the department to accept the idea of allowing as a deduction a reserve for bad debts. In principle this is of course no different from a reserve for cash discounts. In Harrison et al v Heiner[51] a paving contractor was obliged to maintain roads for a five year period in addition to paving streets. The court rightly refused to sanction the filing of amended returns permitting the contractor to carry payments as liabilities for the five year maintenance period and to determine income tax after the expiration thereof. The point of interest is that when the case came before the Commissioner, the taxpayer was not permitted to deduct an estimated reserve for maintenance inasmuch as the liability was contingent. Such a reserve would be sound on accounting principles.

In permitting a deduction for taxes, courts have been troubled by the problem of when the tax accrues. In U. S. v Woodward[52] the estate tax imposed under the Revenue Act of 1916 became due on December 15, 1918, one year after decedent's death. The executors paid the tax on February 8, 1919. In filing an income tax return for the taxable year 1918 the executors claimed as a deduction for that year the estate taxes paid. It was the contention of counsel for the government that the estate tax became due and so accrued immediately upon the death of decedent. The court held that in computing tax payments for purposes of deduction from income, a tax accrues when it becomes due, so that on an accrual basis the deduction could be made in 1918. Regulations 74 Article 154 hold that for the purpose of deduction for taxes, estate taxes accrue on the due date. This is not sound according to accounting principles, for the reason that all the events which fix the amount of the tax occurred on the date of death of decedent. On a cash basis the tax should be treated as a deduction for the year when it is paid.[53]

Following the principle here posited an interesting situation developed in U. S. v Anderson et al.[54] Taxpayer kept his books on an accrual basis and consistently therewith set up a reserve for munitions taxes at the end of 1916. The tax was not due until 1917 and it was the contention of taxpayer that even on an accrual basis the tax did not accrue until it was due and payable. The court held that the tax was not a proper deduction for 1917 but should have been deducted in 1916 where the corporation kept books on an accrual basis. The court said, "In advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it." U. S. v Woodward is clearly inconsistent with this decision, the Anderson case being the sounder rule. U. S. v Anderson has gone far to fix the principle of sound accounting practice as a basis for determining taxable net income. That this is a close decision may be seen by comparing the case with U. S. v Norwich & W R. Co.[55] In the latter case the liability for the payment of a tax did not arise until February 24, 1919 when the Revenue Act of 1918 was passed. The amount of the tax could not have been included as income to the lessor company for 1918, where the lessee was obligated to pay the tax, even though the lessor was on an accrual basis. In the Anderson case the act under which taxes were assessed was in force during the entire year in question.

Following the doctrine of the Anderson case, there is a decision in another case[56] which is again indicative of the trend of courts towards a wholehearted acceptance of sound accounting practice in determining net income. In this case a purchaser of a mortgage note was paid in addition to the interest carried by the note a bonus of one per cent during the life of the note. The total amount of the bonus was uncertain because the note might be paid before maturity. Nevertheless the entire amount of the bonus was charged off by the taxpayer when the note was sold on the theory that the taxpayer could accrue expenses incurred in selling the loan notes. The court permitted the deduction.

Even though an amount is uncertain, if the liability is certain it may be accrued. This is in accord with sound accounting practice and has received the sanction of the courts.[57] In the latter case taxpayer in 1919 accrued as a deduction the difference between increased rates and those it contracted to pay. The former rates were being contested in the courts by a party other than the taxpayer. The actual cash payment was not made until 1925. Nevertheless the deduction was permitted for the year 1919 on the accrual basis.

Somewhat similar to the above case was the one[58] where a corporation committed a breach of contract in 1919 and set up on its books for that year a reserve for the liability under the contract, inasmuch as the corporation filed its return on an accrual basis and considered the deduction a proper one for 1919. The breach consisted in discharging a general sales manager

47. I. T. 1272 C. B., June, 1922, p. 128.
48. Appeal of Associated Gas & Elec. Co., 2 B. T. A. 263.
49. G. C. M. 1242 C. B., June, 1927, p. 177.
50. Appeal of Ederheimer Stein Co., 2 B. T. A. 711. Appeal of M. I. Stewart & Co., 2 B. T. A. 737.
51. 28 F. (2d) 985.
52. 256 U. S. 632.
53. U. S. v. Mitchell, 271 U. S. 9, overruling a dictum in U. S. v. Woodward.
54. See note 16 supra.
55. 16 Fed. (2d) 944.
56. American National Co. Receiver v. U. S., 274 U. S. 99 (1927).
57. Pittsburgh Hotels Co. v. U. S., 63 Ct. Cl. 475, Certiorari denied.
58. American Code Company v. Commissioner, 30 Fed. (2d) 222.

during 1919. The sales manager had a contract expiring in 1937 and suing on that contract the employee obtained a judgment in 1922. The judgment was affirmed in 1923 at which time the corporation paid it. The problem of when to accrue the liability becomes easier of solution if the legal situation is taken into consideration. As a basic legal proposition damages are sustained at the time the contract is broken. The accrual for the liability was therefore correctly set up by the corporation in 1919 and the court so held. To be sure the amount of the liability was in dispute, but some liability was admitted. The corporation was permitted to deduct from its income for the year 1919 the amount established by the judgment rendered subsequently. If the latter amount differed from the amount accrued when the liability was estimated in 1919, the adjustment was made by way of amended returns.

Where no liability is admitted courts do not seem to be clear as to whether the deduction on a judgment should be made when the decision is rendered by a lower court or when the judgment is affirmed and paid. The final decree should fix the liability and thus also the time when the judgment might be deducted where books are kept on the accrual basis. This was so held in Consolidated Tea Co. Inc. v Bowers.[59] Two other cases[60] however held that the time for deduction of the judgment should be the date the judgment was rendered in the lower court. In the Becker Bros. case the amount of the judgment was deposited in escrow pending the appeal; in the Malleable Iron Range Co. case there was deposited an appeal bond and Liberty Bonds. From the point of view of the party receiving the judgment, the Treasury Decisions[61] consider this income for the year in which the highest court rendered its decision.

Frequently the doctrine of "constructive receipt" is employed in the case of a taxpayer reporting on a cash basis to include items of income not actually received but which would have been received except for the unwillingness or neglect of a taxpayer to do so. This doctrine does not trouble accountants where books are kept on an accrual basis, but it does cause some difficulty in construing income on a cash basis. In the case of Faust v U. S.[62] an executor in 1914 agreed to take no fees for his services. This agreement he repudiated later on in the same year, at which time he claimed full commissions. This having been paid to him in 1917, taxpayer sought to have the income taxed in 1914 on the theory of "constructive receipt," taxpayer reporting on a cash basis. The court held that it was income in 1917. The money was not actually set apart in 1914 and the other executors could have withheld the fee until final settlement. Where the right to receive money is disputed there can be no constructive receipt. Dr. Klein[63] puts it this way: "He (taxpayer) should have an unqualified right successfully to demand possession and dominion" before he can say there has been constructive receipt.

Enough has been presented in this brief survey to indicate the development of sound accounting principles as a basis for determining net income subject to taxation. The progress has been slow but steady; has met temporary setbacks and in some instances almost insurmountable obstacles. Inasmuch as income taxation is unquestionably a permanent institution, future development must proceed along scientific principles of accounting. It took nine years for the tax acts to change from an unequivocal cash basis (Acts of 1909-1913) through a grudging admission of the alternative accrual basis (Acts of 1916 and 1917) to an absolute requirement of the accrual basis (Act of 1918) in most cases. Economic considerations will probably influence the opinions of courts in the direction of judgments based on sound accounting principles.

59. 19 F. (2d) 382 (1927).
60. Becker Bros. v. U. S., 7 F. (2d) 2 (1925). Malleable Iron Range Co. v. U. S., 65 Ct. Cl. 441 (1928).
61. I. T. 1294; C. B. June, 1922, p. 111; also Sol. op. 41 C. B., 1920, p. 364.
62. 65 Ct. Cl. 676 (1928).
63. Federal Income Taxation.

"That Great Litigation"

(*Continued from Page 603*)

great company of British heroes and statesmen. A portrait of Washington hangs on the wall of the Prime Minister's room in Downing Street, with those of Pitt, Fox, and Nelson. A bronze replica of Houdon's famous Washington, the original of which is in the State Capitol at Richmond, stands "amid the mighty monuments and memories of Trafalgar Square." And it stands there, as Lord Curzon said when he accepted it for the people of England, and speaking for them—"Because Washington was a great Englishman—one of the greatest Englishmen that ever lived; because, though he fought and vanquished us, he was fighting for ideals and principles which are as sacred to us as they are to the American people, and which are embedded in the very fibers of our common race." This is, surely, at the least, an admission that the Americans were fighting in this litigation, as they believed they were, for "the cause of liberty." And this brings one to the asking of this unanswerable but irrepressible question: What would have happened if this admission had been made by Lord Mansfield at an appropriate stage of this litigation?

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PROGRAM OF THE FIFTY-SECOND ANNUAL MEETING

Wednesday Morning, October 23, at 10 o'clock

Memphis Auditorium

Addresses of Welcome.

Annual Address by President of the Association.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

State delegations will meet at the *close* of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, October 23, at 2:30 o'clock

Memphis Auditorium

Symposium—"Character Requirements for Admission to the Bar."

"How It Looks to the Bench," William C. Coleman, United States District Court, Baltimore, Md.

"What the Bar Is Doing—What More It Can Do," Emory R. Buckner, New York City.

"The Measure of Responsibility Which Should Be Assumed by Law Schools," H. W. Arant, Dean College of Law, Ohio State University, Columbus, Ohio.

Wednesday Evening, October 23, at 8:30 O'clock

Memphis Auditorium

Address by Hon. Newton D. Baker of Cleveland, Ohio, on "The World Court."

10:00 P. M. President's Reception, Ball Room, Peabody Hotel.

Thursday Morning, October 24, at 10 O'clock

Ball Room, Peabody Hotel

Statement concerning the work of the American Law Institute.

REPORTS OF SECTIONS

(The names of the respective Chairmen are given.)

Comparative Law Bureau—William M. Smithers, Philadelphia, Pa.

Conference of Bar Association Delegates—James Grafton Rogers, Boulder, Colo.

Hotel Peabody, Memphis, Convention Headquarters

Criminal Law—Justin Miller, Los Angeles, Calif.

Judicial Section—Arthur P. Rugg, Worcester, Mass.

Legal Education and Admissions to the Bar—William Draper Lewis, Philadelphia, Pa.

Mineral Law—Earle W. Evans, Wichita, Kansas.

Patent, Trade-Mark and Copyright Law—Henry M. Huxley, Chicago, Ill.

Public Utility Law—Joseph F. Jamison, St. Louis, Mo.

Uniform State Laws—Jesse A. Miller, Des Moines, Ia.

REPORTS OF COMMITTEES

Publicity—Walter H. Eckert, Chicago, Ill.

Membership—Richard Bentley, Chicago, Ill.

Memorials—William P. MacCracken, Jr., Chicago, Ill.

Adjournment.

Thursday Afternoon, October 24, at 2 o'clock

Ball Room, Peabody Hotel

REPORTS OF COMMITTEES

American Citizenship—F. Dumont Smith, Hutchinson, Kans.

Education of Aliens and Naturalization—William C. Kinkead, Cheyenne, Wyo.

International Law—James Brown Scott, Washington, D. C.

Removal of Government Liens on Real Estate. John T. Richards, Chicago, Ill.

Jurisprudence and Law Reform—Paul Howland, Cleveland, Ohio.

Federal Taxation—Hugh Satterlee, New York City.

Judicial Salaries—A. B. Andrews, Raleigh, N. C.

Admiralty and Maritime Law—T. Catesby Jones, New York City.

Commerce—Rush C. Butler, Chicago, Ill.

Commercial Law and Bankruptcy—Jacob M. Lashly, St. Louis, Mo.

Professional Ethics and Grievances—Thomas Francis Howe, Chicago, Ill.

Supplements to Canons of Professional Ethics—Charles A. Boston, New York City.

Thursday Evening, October 24, at 8:30 O'clock

Memphis Auditorium

Address by Dr. Walter C. Simons, Chief Justice, Supreme Court of Germany, "The Relation of the German Judiciary to the Executive and Legislative Branches of the Government compared with that of the United States."

10 P. M. Plantation Scene and Chorus.

Friday Morning, October 25, at 10 O'clock

Ball Room, Peabody Hotel

REPORTS OF COMMITTEES

Publications—Alfred C. Intemann, New York City.

Division of Eighth Circuit—A. C. Paul, Minneapolis, Minn.

Uniform Judicial Procedure—Thomas W. Shelton, Norfolk, Va.

Insurance Law—William Brosmith, Hartford, Conn.

Legal Aid—Reginald Heber Smith, Boston, Mass.

Aeronautical Law—Chester W. Cuthell, New York City.

Radio Law—Louis G. Caldwell, Chicago, Ill.

Change of Date of Presidential Inauguration—Levi Cooke, Washington, D. C.

Noteworthy Changes in Statute Law—Joseph P. Chamberlain, New York City.

Nomination and Election of Officers.

Miscellaneous Business.

Adjournment sine die.

Friday Afternoon, October 25, at 2 O'clock

Automobile ride, Polo Game and Tea at Memphis Hunt and Polo Club.

Friday Evening, October 25, at 7 O'clock

Annual Dinner of members of the Association, ladies and guests at the Memphis Auditorium.

Saturday, October 26

All day boat trip as guests of the Bar Association of Tennessee and Memphis and Shelby County Bar Association.

PROGRAMS OF SECTIONS AND ALLIED ORGANIZATIONS

Meetings of Committees

The Standing Committee on Professional Ethics and Grievances, Thomas Francis Howe, Chairman, will hold a public meeting on Monday, Oct. 21, on the Mezzanine Floor of the Peabody Hotel. The morning session will begin at 10:30 and the afternoon session at 2:15. For full notice of the purpose of this public meeting see Current Events Department.

Motor Driveway, Overton Park, Memphis

The following Standing Committees will hold an open meeting on Tuesday, October 22nd, at the Peabody Hotel:

10 A. M. Standing Committee on Jurisprudence and Law Reform, Paul Howland Chairman.

2 P. M. Standing Committee on Aeronautical Law, Chester W. Cuthell, Chairman, and Standing Committee on Radio Law, Louis G. Caldwell, Chairman. (Joint Session.)

Information concerning additional meetings and places where all Committee meetings will be held will appear in October Journal and Final Program.

Conference of Commissioners on Uniform State Laws

Louis XVI Ball-Room, Peabody Hotel, Memphis, Tenn.

Monday, October 14, to Saturday, October 19, Inclusive

For detailed program see July Journal, p. 412.

Judicial Section

Tuesday, October 22, Peabody Hotel

10 A. M. Address of Welcome, by Hon. Harry B. Anderson, Judge, United States District Court, Memphis, Tenn.

Response by Chairman.

Reports of Committees.

Address by Hon. W. Lee Estes, Judge, United States District Court, Eastern District of Texas, "Law Enforcement and the Courts."

Election of Officers.

7 P. M. Annual Dinner for members and ladies, Peabody Hotel.

Night Scene in Memphis Harbor, Showing the Harahan Bridge Across the Mississippi River

Legal Education and Admission to the Bar

Tuesday, October 22, Peabody Hotel

Morning Session, 10:00 o'clock

Paper: "Types and Methods of Bar Examinations." Discussion by representatives of the Boards of Law Examiners of New York, Pennsylvania, and other States.

Paper: "Facts and Implications of College Monopoly of Legal Education."

Afternoon Session, 2:00 o'clock

General discussion of the topic: "Educational Requirements for a Lawyer."

Shall the Section of Legal Education and Admissions to the Bar recommend to the American Bar Association the adoption of the following resolution:

RESOLVED, that law schools shall not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff shall not depend on the number of students or on the fees received.

Business Session, Old and New Business.

Election of Council and Officers for 1929-30.

Mineral Law

Tuesday, October 22, Peabody Hotel

10 A. M. Reports and election of Officers.

10:15 "The Limits of Competition in Mineral Industries," address by Mr. Walton H. Hamilton, School of Law, Yale University.

2 P. M. Address by Hon. Charles S. Thomas, former Senator from Colorado.

7 P. M. Dinner for members and guests at Peabody Hotel.

Patent, Trade-Mark and Copyright Law

Tuesday, October 22, Peabody Hotel

10 A. M. Reports and Election of Officers.

2 P. M. Program to be announced.

7 P. M. Dinner, Peabody Hotel.

Conference of Bar Association Delegates

Fourteenth Annual Meeting, Peabody Hotel, Monday, October 21

Morning Session, 10 A. M.

Roll Call of Delegates.

Opening Address: Chairman, James Grafton Rogers, Boulder, Colo., "The Demand for Reorganization in the American Bar."

Reports of Committees:

The Rule Making Power, Josiah Marvel, Chairman.

The Professional Abuses in Negligence Cases, Henry S. Drinker, Jr., Chairman.

Co-operation Between the Press and the Bar. Andrew R. Sheriff, Chairman.

Bar Discipline. Walter F. Dodd, Chairman.

Judicial Selection. Irvin V. Barth, Chairman.

Bar Organization. Clarence N. Goodwin, Chairman.

Appointment of Nominating Committee.

12:30 P. M.

Informal Luncheon.

Afternoon Session, 2 P. M.

The Progress of the Movement for Judicial Councils: A symposium of Fifteen Minute Reports.

Reports of Delegates on the New Developments in State and Local Bar Associations, Five Minutes Each.

Miscellaneous New Business.

Election of Officers.

7 P. M.

Annual Dinner of the delegates and their friends, possibly in cooperation with other organizations.

Comparative Law Bureau

Tuesday, October 22, Peabody Hotel

1 P. M. Meeting of Council.
2 P. M. Meeting of Bureau.

Section of Criminal Law and Criminology

Tuesday, October 22, Peabody Hotel

Afternoon Session, 2 P. M.

The address of the chairman.
Subject: "The Scientific Development of Criminal Law."

James J. Robinson of Bloomington, Indiana.
Subject: "Recent Activities of State Legislatures and Bar Associations in Connection with Crime."

William C. Woodward, M. D., Director of the Bureau of Legal Medicine and Legislation of the American Medical Association.
Subject: "The Office of Coroner in the United States: Its Proposed Abolition."

Appointment of Nominating Committee.

Evening Session, 8 P. M.

E. W. Camp of the Los Angeles Bar Association.
Subject: "Lawless Enforcement of Law."

W. E. Norvell, Jr., President of the Tennessee Bar Association.
Subject: "Extreme Sentences for Offenses Mala Prohibita."

Edwin M. Abbott of the Philadelphia Bar Association.
Subject: "The Need for Uniform Reciprocal Criminal Laws."

Report of Nominating Committee.
Election of Officers.

Section of Public Utility Law

Monday, October 21, 2:15 P. M., Peabody Hotel

Report of Secretary.

Address: Joseph F. Jamison, St. Louis, Mo., Chairman, "Economic Limitation Upon the Power of Congress or of any Regulatory Body to Fix the Return which Public Utilities Shall Earn."

Address: Kenneth F. Burgess, Chicago, Ill., "The Twilight Zone between the Police Power and the Commerce Clause."

Address: Theodore Schmidt, General Counsel of the Chicago Union Station Company, "Public Utility Air Rights."

Appointment of Committees.
Discussion.

Tuesday, October 22, 10 A. M.

Address: Dr. Walter M. W. Splawn, Washington, D. C., "Government Ownership and Operation."

Address: George B. Logan, St. Louis, Mo., Member St. Louis Air Board, Lecturer, School of Law, Washington University, "Air Craft Law."

Report of Committees.

Election of Officers.

Discussion: The discussions are open, free, not reported.

Tuesday, October 22, 7 P. M.

Formal Dinner of Members and Guests, Hotel Peabody.

Luncheons

Chicago University Law School Alumni: Thursday, October 24, 12:30 P. M.

Columbia Law School Alumni: Thursday, October 24, 12:30 P. M.

Harvard Law School Alumni: Thursday, October 24, 12:30 P. M.

Yale Law School Alumni, Thursday, October 24, 12:30 P. M.

University of Michigan Law School Alumni: Thursday, October 24, 12:30 P. M.

Northwestern University Law School Alumni: Thursday, July 24, 12:30 P. M.

Dinners

Delta Theta Phi: Thursday, October 24, 6:30 P. M.

Phi Delta Phi: Thursday, October 24, 6:30 P. M.

Additional announcements and information concerning places where luncheons and dinners will be held will appear in October Journal and Final Program.

Queer Action of Illinois Lawyers

"Quincy lawyers enjoyed an all-day picnic and outing at Eagles' Alps on Saturday, June 22. The day was filled with various kinds of entertainment, running from a chicken dinner at noon to baseball and horse shoe pitching in the afternoon."—*Ill. St. Bar Association Bulletin.*

This is, we believe, the first case on record of a group of lawyers running from a chicken dinner.

Supply of Crime Material Said to Be Ample

New York, Aug. 9.—(A. P.)—Twelve specialists in criminology have been selected by Columbia university to conduct a nationwide study of the crime situation.—*Press Dispatch.*

While the increasing number of crime students naturally tends to raise some question as to the supply of clinical material, it is believed that with careful handling there will be plenty of crimes to go around.

ARRANGEMENTS FOR MEMPHIS MEETING

TO be held at Memphis, Tennessee, October 23, 24, 25, 1929. HEADQUARTERS: Hotel Peabody, Union Avenue and Second Street.

Reservations and Hotel Information

Requests for reservations and information concerning the Peabody and other Memphis hotels should be addressed to the Executive Secretary, Olive G. Ricker, 209 South La Salle Street, Chicago, Illinois. **Space at the Peabody Hotel is exhausted.** Please specify other hotels in making request for reservation.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations stating (1) First and second choice of hotel (2) whether double or single room is wanted and if double the names of persons who will occupy it; (3) the approximate rate; (4) date of arrival, including definite information as to whether such arrival will be in the morning or evening.

Every effort will be made to comply with requests made. When requests cannot be complied with, the best available accommodations will be assigned. Twin bedrooms have been exhausted. As accommodations in all downtown hotels are rapidly being exhausted, reservations should be made as early as possible.

Railroad Transportation

Individual identification certificates will be sent, on request to the Executive Secretary, to all members of the Association who expect to attend the Annual Meeting, enabling them to secure a round-trip ticket at fare and one-half, return limit Oct. 31, or round-trip ticket good for thirty days at fare and three-fifths.

ADDITIONAL HOTEL ACCOMMODATIONS

HOTEL	Distance from Headquarters	Single	2 Persons—Double Bed	2 Persons—Twin Beds	Without Bath Single	Without Bath Double
Ambassador	5 Blocks	$2.00	$3.50 to $4.00		$1.50	$2.50 to $3.00
Catholic Club (for men)	5 Blocks				1.50 (Shower bath available)	$2.50
Chisca	3 Blocks	$2.50 to $5.00	4.50 to 5.50		$2.00 to $2.50	$3.00 to $4.00
Claridge	6 Blocks	3.50 to 4.00	5.00 to 6.00			
Gayoso	3 Blocks				$2.50	$4.00
Hermitage (for men)	1 Block		$3.00	$4.00	$1.00	
Forrest Park Apartments	1 Mile	Parlor, Bedroom, Bath and Kitchenette $4.00 to $6.00.				
Parkview Apartments	3 Miles	Parlor, Bedroom, Bath and Kitchenette $8.00 to $10.00. Parlor, Bedroom and Bath, Single $4.00, Double $6.00. Regular Hotel Reservations, $3.50 Single and $5.00 Double.				

These apartments cannot be reserved in advance, but a number will be available at time of meeting.

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation

BY MIDDLETON BEAMAN, ALLAN H. PERLEY, ALFRED K. CHERRY, HENRY G. WOOD AND CHARLES F. BOOTS

Foreign Relations

THE settlement of the war indebtedness from foreign governments is continued by Public 747 which authorizes the Secretary of the Treasury, with the approval of the President, to conclude an agreement for the settlement of the indebtedness of Greece in general terms as follows:

The amount of indebtedness to be refunded is $18,125,000 which (together with $2,205,000 of interest) is to be paid semi-annually for a period up to January, 1990. The amount of the first installment is to be $40,000, the annual installments increasing to $350,000 in the eleventh year and continuing at that rate.

To assist in the completion of the work of the Greek Refugee Settlement Commission, the Secretary of the Treasury is authorized to advance to Greece $12,167,000, for which Greece is to give twenty-year gold bonds with interest at 4 per centum payable semi-annually, with provisions for a sinking fund sufficient to retire such bonds within twenty years, and Greece to furnish as security for the loan the excess of revenues under the control of the International Financial Commission, and to procure the assurance of the service of the loan by

that commission. Greece is to forego all claims for further advances under the tripartite loan agreement, dated February 10, 1918, which agreement as between the United States and Greece is to terminate upon the date the debt settlement agreement with Greece becomes effective.

Section 25 (d) of the Trading with the Enemy Act, as amended by the Settlement of War Claims Act of 1928, provides that the Alien Property Custodian shall deposit money and property in his possession owned by the German Government or any member of the former ruling family to the "Special Deposit Account." The section also provides that money and other properties shall be considered to be owned by the German Government if no claim has been filed with the Alien Property Custodian prior to the expiration of one year from the date of the enactment of the Settlement of War Claims Act (March 10, 1928). Public 794 changes one year to two years.

A complication resulting from our federal system is dealt with by the last Congress. Insane aliens are in certain cases deported from this country, and equally Canada has not felt that the care of American insane persons is a proper charge on the tax payers of the Dominion. However, an American citizen living in Canada has lost his state domicile, so that no state is responsible for his care. The border states could not be expected to welcome to their overcrowded asylums Americans exported to their soil from Canada, who had no claim upon them and had perhaps never lived in their territory. So the Federal Government has very properly assumed the burden. Public 935 authorizes the transfer to St. Elizabeth's Hospital, in the District of Columbia, of any American citizen legally adjudged insane in the Dominion of Canada in case it is impossible to establish the legal residence in the United States of such citizen. Provision is made for the transfer of any such person to his legal residence upon the ascertainment thereof. It is provided that any such person may have a hearing in the Supreme Court of the District of Columbia upon his mental condition and the right of the superintendent of St. Elizabeth's Hospital to hold him for treatment.

Canal Zone

Public Resolution 99 authorizes the President to have made an investigation and survey to ascertain the practicability and approximate cost of constructing and maintaining additional locks and other facilities at the Panama Canal to provide for the future needs of interoceanic shipping, and of constructing and maintaining any other route for a ship canal between the Atlantic and Pacific Oceans. The Resolution also authorizes the President to have made an investigation and survey with respect to the practicability, advantages, and approximate cost of constructing and maintaining a canal across Nicaragua. Authorization is made for an appropriation of $150,000. The President is requested to report to Congress within two years the results of the investigations and surveys authorized, together with his recommendations.

Immigration

Immigration officials on the Mexican and Canadian borders have experienced difficulty in enforcement of the immigration laws, owing to the practice of an alien, when deported over the border, to turn around and come back again, with no penalty other than again being deported. To remedy this situation, Public 1018 provides that an alien who has been arrested and deported shall be excluded from admission, and, if he attempts to enter the United States, shall be guilty of a felony, punishable by imprisonment for not more than two years or by a fine of not more than $1,000, or both. The Act also applied in cases where the arrest and deportation took place before the enactment of the Act (March 4, 1929), but by Public No. 21 of the 71st Congress (passed June 24, 1929), it is provided that the Act shall not apply in the case of an alien to whom permission has been given by the Secretary of Labor prior to March 4, 1929, to reapply for admission.

Public 1018 also makes it a misdemeanor for an alien to enter the United States at a time and place other than as designated by immigration officials, or to evade examination or inspection by immigration officials, or to obtain entry by false or misleading representation or the willful concealment of a material fact.

The Act also provides that no alien who has been sentenced to imprisonment shall be deported under any law until the termination of the imprisonment, but that the imprisonment shall be deemed terminated upon his release from confinement, whether or not subject to re-arrest and further confinement for the same offense. This latter provision was inserted to settle a dispute with some States which claimed that the release of an alien on parole left him subject to the jurisdiction of the State, and that he could not be deported while on parole. Claim has been made by some that this new provision is an unconstitutional interference with the right of the State, but in the view of the House Committee on Immigration, which originated this provision, the power of Congress over deportation of aliens is supreme.

Naturalization

A large number of aliens who came to the United States before the passage of the quota restrictions found themselves unable to obtain naturalization because the immigration records did not show the place, time, and manner of their arrival, a certificate stating these facts being an essential requirement of the naturalization process. In a large number of these cases the trouble was due to imperfect immigration records maintained at the ports of entry and in other cases to the fact that the alien came across the border without being inspected by immigration officials. In most of these cases the time limit for deportation had expired and the result was that the alien could neither be deported for unlawful entry nor could he be naturalized. To remedy this situation Public No. 962 provides for making a record of entry if the alien can satisfactorily prove to the Commissioner General of Immigration that he entered the United States prior to June 3, 1921, has resided here continuously since that time, is of good moral character, and is not subject to deportation. Upon the making of such record the certificate of arrival required by the naturalization laws may be issued, and such record may be also used by the alien as a

basis for obtaining a permit to reenter after temporary absence abroad.

The Act also adds a provision to the present naturalization laws that no declaration of intention shall be made until lawful entry for permanent residence has been established and a certificate of arrival issued.

The Act also amends the law relating to proof of residence for naturalization purposes and also changes the residence requirement. The old law required continued residence in the United States for five years and for one year in the State. The new Act substitutes for one year in the State six months within the county and creates a presumption of the breaking of the continuity of the five-year period by an absence for more than six months and less than a year, and a conclusive presumption of the breaking of the continuity by an absence for a continuous period of one year or more.

The Act contains a number of other amendments to the naturalization laws including an increase in the schedule of fees and a provision for issuance of certificates of citizenship to persons who have derived their citizenship through the naturalization of a parent or husband. Provision is also made for a special certificate of citizenship to a naturalized citizen for use by him only for the purpose of obtaining recognition as a citizen of the United States by the country of his former allegiance. This certificate is not given to the alien but transmitted by the Secretary of State to the proper authority in the foreign country. The Act also requires each applicant for a declaration of intention and each petitioner for citizenship to furnish two photographs of himself. These photographs are to be attached to the declaration and the certificate of citizenship, respectively.

Aliens seeking naturalization have sometimes suffered a hardship owing to the requirement that at the time of taking out their first papers they renounce their allegiance to their foreign sovereign. This requirement not only put them in an anomalous position during the time between the taking out of their first papers and the completion of their citizenship, but also led to dismissal of the petition at final hearing in some cases because the alien named the wrong sovereign due to a change in political boundaries as a result of the World War. Public 1011 remedies this defect by requiring the alien in taking out his first papers merely to declare his intention that he will before being admitted to citizenship renounce his allegiance to his sovereign. The Act requires him to announce his intention to reside permanently in the United States, and also forbids the making of a declaration of intention or a petition for naturalization outside the office of a clerk of the court.

The Act also extends from May 28, 1926, to March 4, 1931, the time within which alien veterans may take advantage of the quick naturalization process afforded by the Act of May 26, 1926.

Conservation (Migratory Birds)

As a result of the Migratory Bird Treaty with Canada,[1] the Congress was empowered to protect, on a national scale, migratory birds by regulating the seasons and method of killing game birds and prohibiting the taking of others, and providing for punishment of persons who break the law. In Public 770, known as the "Migratory Bird Conservation Act," Congress has taken another step to carry out the purposes of the Treaty by providing for the acquisition or rental by the United States of marsh and swamp lands throughout the United States to be used as game bird refuges. Such lands when acquired will be improved and made suitable by the construction of ditches, dikes, dams, spillways, and other improvements which will minimize the loss of migratory game birds from poisoning and pollution of waters and provide suitable grounds for propagation.

A commission consisting of the Secretary of Agriculture, as chairman, the Secretary of Commerce, the Secretary of the Interior, and two members of the Senate and House of Representatives is created for the purpose of passing upon suitability of areas purchased and the purchase price or rental to be paid therefor. The governor or a representative of the game commission of each State shall be a member ex officio of such commission for the purpose of voting on questions relating to the acquisition of areas for game preserves in his State. No lands are to be acquired within the boundaries of any State until the State consents by law to such acquisition by the United States. State civil and criminal jurisdiction over such acquired areas are not affected or changed by reason of their acquisition and administration by the United States "except so far as the punishment of offenses against the United States is concerned," which evidently includes breaches of the Migratory Bird Protection Act.

Appropriations totaling $7,875,000 for the first ten years, and $200,000 for each year thereafter, are authorized for the acquisition of such migratory bird reservations and for the payment of necessary expenses incident to the administration, maintenance, and development, for the construction of dams, dikes, ditches, and other improvements, and for the elimination of poisoning and pollution of the waters within the reservations.

Merchant Marine

Public 934 is concerned with safety at sea. It requires merchant vessels of 250 gross tons or over, engaged in certain foreign trade, to be marked with load lines indicating the maximum depth to which they may be safely loaded. No vessel covered by the Act is to be permitted to leave port without such load line being marked upon it, and without having on board a certificate, issued in accordance with the requirements of the Act under the direction of the Secretary of Commerce, certifying that the vessel is properly marked. It is declared unlawful for any vessel subject to the Act to be loaded so as to submerge in sea water its load line or lines, or so as to submerge the point where such load line or lines ought to be marked. Vessels of a foreign country complying with load line laws of their own country are exempt from the provisions of the Act, but only in case the foreign country grants similar exemption to vessels of the United States. Power is given to collectors of customs to detain vessels believed to be leaving port loaded in violation of the Act, the action of any such collector being reviewable by the Secretary of Com-

1. 39 Stat. 1702.

merce. The effective date of the Act is postponed eighteen months.

Public 746 amends subdivision (a) of section 4009 of the Revised Statutes, as amended, with respect to the compensation payable to vessels of United States registry for transportation of foreign mails. Compensation heretofore provided for by such section was an amount "not in excess of the amount of postage collected" on the mail transported on the vessel. The amendment provides for the payment of not in excess of 80 cents a pound for letters and post cards and 8 cents a pound for other articles, including parcel post. The report of the House committee indicates that the effect of the amendment will be not to cause an actual change in rates.

Administration

Under the so-called War Minerals Relief Act, approved March 2, 1919, as amended, the Secretary of the Interior was authorized to adjust, liquidate, and pay losses suffered by any person "by reason of producing or preparing to produce" certain minerals upon the request or demand of certain government departments and independent establishments. Disputes have arisen with regard to the interpretation of some of the language of such Act, as amended. Many claimants believe that they are entitled to larger payments than the Secretary of the Interior has determined upon. Under such legislation the decisions of the Secretary of the Interior have been final. Congress, by Public 728, has provided for court review of the decisions of the Secretary of the Interior. This amendatory Act authorizes the filing of a petition in the Supreme Court of the District of Columbia to review "the final decision of the Secretary of the Interior upon any question of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment" of the claim in question. The decision of the Secretary on all questions of fact is made conclusive. Appeal may be taken by either party to the Court of Appeals of the District of Columbia, the final judgment of such court being made reviewable by the Supreme Court of the United States. The Secretary of the Interior is required to adjust the claim in accordance with the court judgment or decree, and, therefore, the Act is probably valid in its grant of jurisdiction to the Supreme Court. If the Secretary were not required to follow the court judgment or decree the grant of jurisdiction would probably be invalid, under the doctrine of the case of Old Colony Trust Company v. Commissioner of Internal Revenue, decided by the United States Supreme Court on June 3, 1929.[2]

Congress has made a step in smoothing the path of the claimant against the District of Columbia. Public 719 gives the Commissioners of the District of Columbia power to settle out of court certain claims and suits against the District. By the terms of the Act the Commissioners are empowered to settle a claim or suit whenever the cause of action (a) arises out of the negligence or wrongful act, either of commission or omission, of any officer or employee of the District of Columbia for whose negligence or acts the District of Columbia is prima facie liable to respond in damages, or (b) arises out of the existence of facts and circumstances which place the claim or suit within the doctrines and principles of law decided by the courts of the District of Columbia or by the Supreme Court of the United States to be controlling in the District of Columbia. Section 2 of the Act authorizes the Commissioners to grant relief in the case of claims for refund of taxes paid or for cancellation of certain assessments, in cases where like assessments have been held void or erroneous by court decision, a one-year period of limitation being prescribed for the filing of claims for such refunds or cancellations. No settlement exceeding $5,000 may be made under the Act. All settlements are required to be presented to Congress with an explanatory statement, and appropriations for the payment of settlements are authorized to be made.

Uncle Sam approves Central Purchasing. Public 833 has for its principal purpose the concentration under one administrative head of the purchasing of supplies for the Executive branch of the Government. It authorizes and directs the Secretary of the Treasury, through the General Supply Committee, to "purchase or procure and distribute supplies to meet the consolidated requirements of the Executive departments and independent establishments of the Federal Government in Washington, District of Columbia, and of the municipal government of the District of Columbia," and also provides that the requirements of the field services may be met in the same manner. The Act provides for the establishment of a special fund in the Treasury Department for the purpose of carrying out the provisions of the Act, and such fund is to be reimbursed by the Departments and independent establishments for which purchases are made. Provision is made for the acquisition of a site and the construction of a warehouse or warehouses, to provide storage space and facilities for the use of the General Supply Committee, of departments and independent establishments of the Government, and the municipal government of the District of Columbia. Authorization is made for an appropriation of $1,750,000.

Public Resolution 108 creates a joint congressional commission to make a study of the various executive agencies engaged in administering the matters pertaining to the insular possessions of the United States for the purpose of determining the advisability of placing all such matters under the jurisdiction of a single bureau or department. The commission is also to determine upon a plan of organization for such bureau or department and what transfers of executive functions are necessary. The heads of the executive departments and independent establishments are directed to cooperate with the commission in making its study, upon the request of the commission. The report of the commission is to be made to the Congress on or before December 16, 1929.

Public 744 may be of interest to the public in that it authorizes the Postmaster General to furnish the sender of mail a receipt showing the mailing thereof. A fee to be determined by the Postmaster General will be charged for such receipt. It is expected that this additional service to users

2. 49 Sup. Ct. 499.

of the mail will to some extent increase the revenues of the Post Office Department.

Police

Public 769 authorizes the Secretary of Agriculture to charge and collect from livestock owners a reasonable fee for the inspection of brands on livestock subject to the Packers' and Stockyards' Act, for the purpose of determining ownership, but the fee is not to be imposed except upon written request by the Board of Livestock Commissioners, or duly authorized livestock association from the States from which the livestock were shipped.

Public 871 amends section 4 of the Act of June 15, 1917 (the so-called Espionage Act), by providing that arms and munitions of war condemned under the provisions of such Act shall be delivered to the War Department. Prior to the enactment of this amendatory Act, arms and munitions of war, like all other property condemned under such Act of June 15, 1917, were required to be disposed of by sale, and the proceeds thereof, less legal costs and charges, paid into the Treasury.

Revision of the Laws

Complete authority for future editions and supplements of the Code of Laws of the United States and of the Code of Laws of the District of Columbia is provided by Public Res. 101. These new editions and supplements are to be prepared under the direction of the Committee on Revision of the Laws of the House of Representatives, without need of further action by Congress, but will continue, as does the present code, to be merely prima facie evidence of statutes until such time as Congress may otherwise provide.

Federal Aid to States

Public 702 extends the provisions of the Smith-Hughes Act, approved February 23, 1917, by authorizing an appropriation of $500,000 for the fiscal year ending June 30, 1930, and for each year thereafter, for a period of four years, of a sum exceeding by $500,000 the sum appropriated for each preceding year. One-half of such sum is allotted to the States and Territories in the proportion that their farm population bears to the total farm population of the United States, exclusive of the insular possessions, and is to be used for the payment of salaries of teachers, supervisors, and directors of agricultural subjects. The remaining half of such sum is allotted to the States and Territories in the proportion that their rural population bears to the total rural population of the United States, exclusive of the insular possessions, and is to be used for the payment of salaries of teachers, supervisors, and directors of home economic subjects.

The Smith-Hughes Act allotted money to the States for the teaching of agricultural subjects upon the ratio of the rural population of each State to that of the United States and for the teaching of home economics subjects upon the ratio of the urban population of each State to that of the United States. Under that Act funds were sufficient to aid only 29 per centum of the rural high schools of the United States in maintaining vocational agriculture and the funds for teaching of home economics subjects were sufficient to aid only 87 per centum of the public high schools.

Public 702 makes possible the extension of vocational education in agriculture and home economics subjects to additional rural districts and farm communities not receiving such benefits under the Smith-Hughes Act.

The Federal Board for Vocational Education is directed by Public 801 to provide for the vocational rehabilitation and return to employment of any resident of the District of Columbia who is or may be expected to become totally or partially disabled for remunerative occupation, regardless of whether the disability is congenital or is acquired by accident, injury, or disease. A sum not to exceed $15,000 for each fiscal year is authorized to be appropriated from Federal funds for this purpose if an equal amount is appropriated from funds belonging to the District of Columbia. The Act is similar to the Federal Vocational Rehabilitation Act of June 2, 1920, which did not include the District of Columbia.

Nonmailable Matter

Before the enactment of Public 649 the Postmaster General was authorized to permit the transmission in the mails of certain articles which, under Section 217 of the Penal Code would have been nonmailable, if sent "from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians" if the articles were not "outwardly or of their own force dangerous or injurious to life, health, or property." The amendatory Act broadens the power of the Postmaster General by authorizing him to permit transmission, under rules and regulations to be prescribed by him, without restriction with respect to who may mail or receive the article, but empowers the Postmaster General, in the case of poisonous drugs and medicines, to prescribe the same limitations heretofore prescribed in the section with respect to who may mail or receive the article.

Imitative Lawmakers

In an editorial, "Imitation—Good and Bad," in the September issue of the JOURNAL, we gave an illustration of the unfortunate effects of following the imitative instinct in a matter involving the administration of justice. It was found in a paragraph from the address of President George M. Hogan of the Vermont Bar Association, dealing with the apparently hasty and thoughtless way in which certain states had copied an early constitutional provision taking away the judge's common law right to assist the jury in arriving at a sound verdict.

It has been suggested that the failure to mention the statutory provisions to the same effect, which exist in a large number of states, might give rise to an impression that the same unfortunate and ill considered imitativeness had not obtained in the statutory field and also that the constitutional prohibitions were the most numerous. Such, of course, is not the case. Eighteen states have statutes on the subject, many no doubt adopted because some other state had one, while only eight have constitutional provisions. In twelve states the process of "strangling the judge," as Mr. Hogan puts it, has been carried on by judicial decision, there being no statutory or constitutional provision on the subject. Ten of the states—seven eastern and two western—and the Federal Courts have preserved the historic rule of the common law.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR, MANAGER
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THE CONSTITUTION AND NATIONAL FEELING

Mr. Weaver uses a pregnant phrase in his article in the September JOURNAL on "Teaching the Constitution." The ultimate purpose of the movement, he says, is to inspire "the emotional culture" necessary to give permanency to our democratic institutions. In other words, it strives to create and stimulate for the Constitution, as the supreme expression of the law of the land, something like that instinctive feeling of loyalty and allegiance which peoples in all history have felt for the sovereign as the symbol of the National power.

The objective is sound. The deliberate attempt to cultivate such sentiment by means of a better understanding of the Constitution is like the effort of a builder to sink his foundations to the deepest and surest base. Mere intellectual appreciation of a constitution is not enough, and can never extend to a whole people. Any governmental institution will be in peril which rests on that alone. We have gotten beyond the illusion of the French revolutionaries that reason rules in all things. The mind is not a thing of reason alone, and reason in the political field, at least, is often a mere instrument to work with the materials furnished by feelings and desires. The great major premises of individual and national life are not the fruits of logical processes but spring from profound depths of feeling.

The mere intellect may see the Constitution as a series of expedient arrangements, but feeling will always find in it, to use the words of another, "a noble compact between the living and the dead and the generations yet unborn." The intellect may see in many of its provisions merely a statesmanlike compromise, but feeling will always catch the birth-pangs of a mighty nation, and see in its text the record of perhaps the greatest political drama ever played on the stage of history. The critical eye may see only men and statesmen as the great protagonists in the affair, but the heart will find its heroes and will treasure their achievements as men treasure the hero tales of old time. The intellect may see merely the preparation and elaboration of a political document, but sentiment will hear the wings of the centuries beat about this culminating effort to solve the problem of men's political institutions in the right way.

And is the program for the ultimate culture of the emotions, this stimulation of a constant attitude of honor, reverence and respect for the Constitution, an attempt to foreclose all questions without debate and to relegate reason permanently to an insignificant place? By no means. It merely recognizes the immense part which the emotional element, as opposed to the purely intellectual, always plays in the attitudes and decisions of masses of men. It simply means a recognition of the fact that, since feeling must always govern to a great extent, it is unwise to leave its operations to chance or the casual influence of the moment. This program to stimulate reverence for the Constitution seeks to raise no barrier against well considered and needed change, but it does furnish an added assurance that the arguments for change be not opposed to the spirit of the instrument itself.

THE DICTATORS STATISTICALLY CONSIDERED

Never since the science of statistics attained its modern importance have there heretofore been enough dictators in the European world to permit the institution to be judged by statistical methods. However, just now there seems to be enough dictatorial material to permit the scholar to make the attempt. This is what was done by Prof. William E. Rappard, of the University of Geneva, at the recent meeting of the Institute of Politics at Williamstown.

There are at present nine plain dictatorships in operation in Continental Europe. Four are in republics — Lithuania, Poland,

Portugal and Russia. Five are in monarchies—Albania, Hungary, Italy, Spain and Yugoslavia. Considering the situation from the standpoint of geographical position, population, area, newness of statehood or particular form of constitutional government, he concludes that no correlation can be found between dictatorships and those factors. In all nine cases, however, dictatorships can be correlated, directly or indirectly, with war and its social and financial consequences. But the most interesting and striking correlation he finds is that between dictatorships and the economic structure of the countries involved.

If the states of Europe as a whole are arranged in the order of the proportion of the gainfully employed population engaged in agriculture, it is immediately clear that every country in which dictatorships exist is predominantly agricultural. The countries range from Russia, with an agricultural population of 82.4 per cent, and Yugoslavia with one of 80 per cent, to Italy with a population which is 56.1 per cent of that character. Not all countries with this particular economic structure have dictatorships. But no country not predominantly agricultural has this system.

"The true inference," says Prof. Rappard, is "less that peasants love tyranny and favor dictators than that political liberty may, by and large, be considered to be essentially a product of urban life and of all that city dwelling implies in terms of social instability and in possibilities of individual enlightenment and of collective organization." In Europe, at least, he continues, the ideal of order—always more or less in conflict with the largest measure of freedom — is more stressed in the country than in the city. But "history teaches that a large measure of political freedom is compatible with the reign of order only at a given stage of social evolution, which is rarely attained under predominantly agricultural conditions."

What the war has done, therefore, according to Prof. Rappard, has not been to destroy either democracy or its spirit or ideals. It has simply done away with a superficial appearance and a delusion in countries whose economic and social structures were not yet such that the people could be ripe for the responsibilities of democracy. As these countries develop socially and economically, democracy will become more and more a realizable ideal. The dictatorships will then be seen to be merely a passing phase of political development, perhaps useful at the time, but for many reasons incapable of permanency.

THE PRACTICING PHYSICIAN IN COURT

Two letters printed in our last issue criticised the article, "The Practicing Physician in Court," and one criticised the JOURNAL for printing it. Assuredly the article was not flattering. Certainly, as far as the particular case given is concerned, it is not typical of the profession. But it represented the view and the feeling of a distinguished member of the medical profession, and for that reason we regarded it as a document of real interest to lawyers.

It is important that the profession know what other people think and say of it, particularly people whose views are entitled to consideration. Those views may not be well-founded. They may be mere generalizations from individual experiences. But the fact that reputable people have them is itself a fact of importance and something that the profession may well take notice of. The views expressed and implied in the article in question may or may not be shared by many other members of the author's profession. We have no way of knowing. He certainly thought, we should say, that he was presenting more than a mere individual experience. We printed it for what it might be worth as enlightening the profession as to what others mistakenly thought about it.

In a magazine published by lawyers for lawyers it is hardly necessary to say that neither the procedure of the court nor that of the attorney can be regarded as in any way representative of the general conduct and spirit of the profession.

COURTS AND THE ANNUAL MEETING

Indications point to a large attendance at Memphis. In many of the Southern States courts will take a recess to facilitate the attendance of lawyers. The significance of the event warrants similar action by courts in all sections. It is no unimportant part of the movement to improve the administration of Justice everywhere.

REVIEW OF RECENT SUPREME COURT DECISIONS

Opposition to Constitutional Principle of Duty to Bear Arms in Nation's Defense Held Bar to Naturalization—Aliens Residing in Canada but Coming Daily to United States to Work Are Immigrants Under Immigration Act—Georgia Statute Creating Presumption of Negligence Against Railroads Held Unconstitutional — Presumptions Created by State Penal Statutes Not Controlling in Cases Arising Under Federal Employers' Liability Act—Other Cases

By Edgar B. Tolman*

Naturalization—Pacifism—Duty to Bear Arms

The duty to bear arms in defense of the country is a principle of the Constitution, and opposition to such a principle is a bar to naturalization.

United States v. Schwimmer, Adv. Op. 521; Sup. Ct. Rep. Vol. 47, p. 448.

The Court here considered the petition of the respondent, Rosika Schwimmer, for naturalization. The petition had been filed in a federal district court in Illinois, and there it was denied. The circuit court of appeals reversed this, but on certiorari the Supreme Court, in an opinion by Mr. Justice Butler, upheld the ruling of the district court denying the petition, though three of the Justices dissented.

The Naturalization Act of June 16, 1906, requires the applicant to declare on oath "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." It also requires a showing on the part of the applicant that he is "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

The applicant here was a Hungarian, over fifty years of age. In answer to a question whether or not she was willing to take up arms in defense of the country, she said, "I would not take up arms personally." She expressed her preference for the form of government of the United States. She also stated that she did not see that a woman's refusal to take up arms was a contradiction of the oath of allegiance. She also declared her opposition to any forms of government other than a democratic form, but asserted her steadfast pacifism. As to the latter view she said:

> "Highly as I prize the privilege of American citizenship I could not compromise my way into it by giving an untrue answer to question 22, though for all practical purposes I might have done so, as even men of my age—I was 49 years old last September—are not called to take up arms. . . . That 'I have no nationalistic feeling' is evident from the fact that I wish to give up the nationality of my birth and to adopt a country which is based on principles and institutions more in harmony with my ideals. My 'cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are the children of God."

After a statement of the case, of which the foregoing is a summary, Mr. Justice Butler said:

> Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native born citizens. All alike owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other. . . . But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government. And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications.

Further emphasis was then placed on the fact that citizenship is a privilege; that the burden is on the applicant to show that he is entitled to it, and that doubts should be resolved in favor of the government. The following discussion of the duty to bear arms appears in the opinion:

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.
>
> The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. This Court, in the *Selective Draft Law Cases,* . . . speaking through Chief Justice White, said that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . ."
>
> Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own state-

*Assisted by Mr. James L. Homire

ments that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

The majority opinion then summarized the views of the applicant as to the duty to bear arms: that her objection to military service is not based on sex or age; that she is an uncompromising pacifist with no sense of nationalism; and that she appears disposed to influence others to oppose military service.

The opinion was concluded as follows:

A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our Government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization. . . .

The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act. She failed to do so. The District Court was bound by the law to deny her application.

MR. JUSTICE HOLMES delivered a dissenting opinion which follows:

The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts "may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and except in so far as the same may show that she cannot take the oath of allegiance without a mental reservation." The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. And as to the opinion the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed.

Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States*. . . . But that to me seems unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

MR. JUSTICE BRANDEIS concurred with MR. JUSTICE HOLMES.

MR. JUSTICE SANFORD dissented and expressed his agreement with the views of the Circuit Court of Appeals.

The case was argued by Mrs. Olive H. Rabe for the respondent and by Mr. Alfred A. Wheat for the Government.

Immigration—Treaties—Abrogation by War

Aliens residing in Canada but coming daily into the United States to work are immigrants within the meaning of the Immigration Act and are not within the exception provided in favor of aliens visiting the United States temporarily for business.

The War of 1812 abrogated the provision in the Jay Treaty permitting citizens and subjects of the high contracting parties to pass and repass freely from one country to the other.

Karnuth et al. v. United States et al., Adv. Op. 332; Sup. Ct. Rep. Vol. 47, p. 274.

The question here considered arose on writs of habeas corpus by which two residents of Canada sought to gain admission to the United States. Neither person was a native of Canada, but sought admission under the provisions of §3 (2) of the Immigration Act. By those provisions "an alien visiting the United States temporarily . . . for business or pleasure" is excepted from the class of excluded immigrants.

Both of the persons here seeking admission were accustomed to pass daily from points in Canada where they resided to points in the United States where they worked daily for hire. One was out of employment at the time of attempted entrance, but was seeking further employment here.

The district court dismissed the writ. This was reversed by the circuit court of appeals, on the theory that a construction of the statute excluding the aliens here would conflict with Article III of the Jay Treaty of 1794. It provided that citizens and subjects of the two countries should be free to pass and repass from one country to the other.

The Government contended that no conflict exists between the statute and the treaty and that in any event the treaty provision in question had been abrogated by the War of 1812. Consideration of the latter contention and the conclusion reached made it unnecessary to consider other points.

Before considering the issues involved the Court, speaking by MR. JUSTICE SUTHERLAND, commented on the importance of the case, saying:

We granted the writ of certiorari because of the far-reaching importance of the question. The decision below affects not only aliens crossing daily from Canada to labor in the United States, but, if followed, will extend to include

those entering the United States for the same purpose from all countries, including Canada, who intend to remain for any period of time embraced within the meaning of the word "temporary." By the immigration rules, this time is defined as a reasonable fixed period to be determined by the examining officer, which may be extended from time to time, though not to exceed one year altogether from the date of original entry. Thus, if the view of the court below prevail, it will result that aliens—not native of Canada or any other American country named in §4 (c),—whose entry as immigrants is precluded, may land as temporary visitors and remain at work in the United States for weeks or months at a time.

The following general discussion of the effect of war on treaties then appeared:

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." . . . But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which "is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.

It was then pointed out that the property rights vested under the provisions of treaties made prior to the War of 1812 were not disturbed by it, courts in both the United States and England having so held. The Supreme Court of the United States, in *Society &c. v. New Haven*, had said:

"We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

Similarly, in *Sutton v. Sutton* the High Court of Chancery in England said:

"The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace."

Conceding the soundness of these conclusions the Court proceeded to discuss the difference between the provisions therein considered and those here in question.

These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. . . . The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture.

The learned JUSTICE then reviewed the opinions of text writers on international law, who have attempted to classify treaties as regards their operation during and after war between the high contracting parties.

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

Brief discussion was then devoted to the contention that the term "immigrant" means one who comes to the country for permanent residence.

In construing §3 (2) of the Immigration Act, we are not concerned with the ordinary definition of the word "immigrant" as one who comes for permanent residence. The act makes its own definition, which is that "the term 'immigrant' means any alien departing from any place outside the United States destined for the United States." The term thus includes every alien coming to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions. The only exception pertinent to the present case is the second, quoted at the beginning of this opinion, namely, an alien visiting the United States "temporarily for business or pleasure." The contention is that respondents were temporary visitors for business; and the case is, therefore, narrowed to the simple inquiry whether the word "business," as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. It may be so used as either to include or exclude labor; "for though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor." . . . The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment.

After a brief review of the history of restrictive immigration legislation, the opinion was concluded as follows:

In view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.

The word "business," as here used, must be limited in application to intercourse of a commercial character; and

we hold that the departmental regulation, to the effect that temporary visits for the purpose of performing labor for hire are not within the purview of §3 (2) of the act, is in accordance with the Congressional intent.

The case was argued by Attorney General Mitchell for petitioners and by Mr. Preston M. Albro for respondents.

Constitutional Law—Due Process—State Statutes Creating Presumptions of Negligence

A statutory provision creating a presumption of negligence against a railroad company as to all particular forms of negligence alleged by the plaintiff and imposing upon the railroad the duty of proving the exercise of due care in all such particulars is arbitrary and unreasonable and in violation of the Fourteenth Amendment.

Western & Atlantic R. R. v. Henderson, Adv. Op. 519; Sup. Ct. Rep. Vol. 49, p. 519.

The appellee's husband was killed at a grade crossing in a collision between one of the appellants' trains and a truck which the deceased was driving. Judgment for the appellee was affirmed by the Supreme Court of Georgia. On appeal this was reversed by the Supreme Court in an opinion delivered by MR. JUSTICE BUTLER. In stating the case he said:

> The question presented is whether the due process clause of the Fourteenth Amendment is violated by §2780 of the Georgia Civil Code. It follows: "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any peson in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The plaintiff had alleged negligence in numerous forms, but offered some evidence merely in support of allegations that the crossing was negligently maintained and was in a dangerous condition. The railroad offered much evidence as to these two allegations to show the exercise of due care on its part.

The trial court charged the jury in substance that when the fact of death was made to appear, a presumption of negligence was raised against the carrier as to all the particulars in which negligence was alleged by the plaintiff, and that the burden shifted to the carrier to establish the exercise of due care in such particulars. This instruction, interpreting the statutory provision quoted, was held to be a denial to the carrier of due process of law. As to this the Court said:

> Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect. . . .
>
> Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. . . .
>
> The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause.

Further, it was pointed out that the allegations of negligence to which the presumption applied were inconsistent in some respects.

In concluding the opinion a distinction was drawn between this case and that of *Mobile, J. & K. C. R. R. v. Turnipseed,* on the ground that there the presumption created by statute raised merely a temporary inference which disappeared on the introduction of contrary evidence.

> That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. . . . That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.
>
> The presumption raised by §2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment.

The case was argued by Mr. Fitzgerald Hall for the appellant and by Mr. Reuben R. Arnold for the appellee.

Federal Employers' Liability Act — Contributory Negligence

Where a brakeman is under no duty to alight from a switch engine, but, without looking for approaching trains on an adjoining track, nevertheless does alight in the way of an approaching train on such track, and is killed, his own contributory negligence will bar recovery for his death under the Federal Employers' Liability Act.

Atlantic Coast Line Ry. Co. v. Driggers, Adv. Op. 556; Sup. Ct. Rep. Vol. 49, p. 490.

This action was brought under the Federal Employers' Liability Act by the administratrix of the estate of one Driggers to recover damages for his death. He had been employed as a brakeman by the petitioner, an interstate railroad, and was killed while engaged in such employment. The action was brought in a court of South Carolina where judgment was entered on a verdict for the plaintiff. This the Supreme Court of South Carolina affirmed. On certiorari this decision was reversed in an opinion delivered by MR. JUSTICE SANFORD. At the outset of the opinion he said:

> It is unquestioned that the case is controlled by the Federal Employers Liability Act, under which it was prosecuted. Therefore, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed.

From a review of the evidence the following facts appeared. The deceased was killed by stepping off the footboard of a switch engine and striking a locomotive passing on an adjacent track. He had gone with his train crew to a spur track to do some switching. The spur connected with the easterly or northbound of two

parallel main line tracks. When the switching had been completed the train returned to the main line track and Driggers was expecting that the cars would be shoved back up that line to the point of connection. In such case the switch could be then closed before or after the cars had passed down the main line. When the switching engine arrived at the main line Driggers was facing almost south and could not see northward without looking back. The conductor on the switch train pointed to an approaching south-bound train on the next track. This signal would serve ordinarily also to indicate that the switch train was to back on the north-bound main line. Driggers merely nodded and, without looking back or receiving any signal to get off, stepped off the footboard into the way of the south-bound train and was killed.

After stating the facts summarized above MR. JUSTICE SANFORD said:

> The undisputed evidence shows that Driggers had no duty which required him to dismount from the switch engine at that time, but was supposed to remain on the engine, although it was optional for him to get off and throw the switch.
>
> On the other hand, the undisputed evidence shows that the passenger train, which was a few minutes behind time, and was running from 35 to at least 50 miles an hour, had a clear and unobstructed right of way on the south-bound line. The engineer was on the lookout ahead, had blown signals at a point about 2,000 feet to the north, and again before reaching the scene of the accident; and the automatic bell on the engine, which he had set in motion, was ringing continuously up to the time of the accident. There was no obstruction whatever on the line ahead. Although the engineer saw the switch engine about to enter in a southerly direction on the northbound main line, there was nothing to indicate that any member of its crew would attempt to dismount between the two lines; and Driggers suddenly struck the side of the engine behind the pilot, in a position where he was not and could not have been seen by the engineer, and when it was impossible to stop the train.
>
> Under these circumstances, it is clear that Driggers, by his own negligence, as the sole and direct cause of the accident, brought on his own death, and that there is no ground upon which the liability of the Railroad Company may be predicated. . . .
>
> The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. . . .
>
> The contention that his death was caused by the negligence of the Railroad Company in any respect in which it owed a duty to him is without any substantial support; and the jury should have been instructed to find for the Railroad Company.

The case was argued by Mr. Thomas W. Davis for the petitioner and by Mr. Louis M. Shimel for the respondent.

Federal Employers' Liability Act—State Penal Statutes—Presumption of Negligence

A state statute forbidding and penalizing the employment of certain minors, and construed as making violations of it presumptive negligence on the part of the employer, does not apply in cases arising under the Federal Employers' Liability Act. Under that Act the employer's liability is predicated upon negligence, and presumptions created by the penal statutes of a state will not be upheld to establish liability on other theories.

Chesapeake & Ohio Ry. Co. v. Stapleton, Adv. Op. 540; Sup. Ct. Rep. Vol. 49, p. 442.

In this opinion the Court considered the effect of a state statutory regulation concerning the age of employees, to the extent that the same operates in the field of interstate commerce. The defendant was an interstate carrier incorporated in Virginia, but doing business in Kentucky. In the latter state it employed the plaintiff, a minor, in maintenance work on a roadbed used in interstate commerce. While so employed the plaintiff sustained permanent injury.

A statute of Kentucky forbids, among other things, the employment by a railroad of a child under sixteen years of age. Violations of this entail graduated penalties.

Action was brought thereafter under the Federal Employers' Liability Act to recover for the injuries thus sustained. The trial court charged the jury that if the defendant employed the plaintiff when he was under sixteen years, and if he was injured in such employment when under such age, the plaintiff was entitled to recover. It was this charge (referred to as Charge No. 3) that was urged as error.

The Court of Appeals of Kentucky affirmed the judgment, but on certiorari this was reversed by the Supreme Court. MR. CHIEF JUSTICE TAFT delivered the opinion, stating the issue in the following language:

> The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act. . . . The question squarely presented here is whether the employment by an interstate carrier in Kentucky in the business of interstate commerce of a worker under the age of sixteen years is by reason of the State statute guilty of negligence justifying a recovery under the Federal Act for injuries received during such employment. Instruction No. 3 as given above dispenses with any burden on the part of the plaintiff to show that his injury was due to his age.

Cases were then reviewed dealing with the effect of state statutes defining liability or controlling procedure in cases arising under the Federal Employers' Liability Act. They fully illustrate the rule that that Act is exclusive and that statutory provisions do not apply in cases occurring in interstate commerce.

As to the effect of a penal statute in such circumstances the Court said:

> We come then to the specific question whether the violation of a statute of a State prohibiting the employment of workmen under a certain age and providing for punishment of such employment should be held to be negligence in a suit brought under the Federal Employers' Liability Act. That the State has power to forbid such employment and to punish the forbidden employment when occurring in intrastate commerce, and also has like power in respect of interstate commerce so long as Congress does not legislate on the subject, goes without saying. But it is a different question whether such a State Act can be made to bear the construction that a violation of it constitutes negligence *per se* or negligence at all under the Federal Employers' Liability Act. The Kentucky Act, as we have set it out above, is a criminal act and imposes a graduated system of penalties. There is nothing to indicate that it was intended to apply to the subject of negligence as between common carriers and their employees. It is true that in Kentucky and in a number of other States it is held that a violation of this or a similar State act is negligence *per se*, and such a construction of the Act by a State court is binding and is to be respected in every case in which the State law is to be enforced. . . . But when the field of the relations between an interstate carrier and its interstate employees is the subject of consideration, it becomes a federal question and is to be decided exclusively as such.

The opinion then observed that, although no authority on the question has been found in the federal courts, several state courts have considered it. These were summarized and upon examination were found to support the view that the operation of such a state stat-

ute is suspended in cases arising under the federal Act.

The opinion was concluded as follows:

> We think that the statute of Kentucky limiting the age of employees and punishing its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce and that application of it in this case was error.

The case was argued by Mr. Le Wright Browning for the petitioner and by Mr. George B. Martin for the respondent.

Federal Employers' Liability Act—Employment Obtained by Fraud—Application of Act

A railroad employee who obtains employment with an interstate railroad by fraudulent misrepresentation is not entitled to the protection of the Federal Employers' Liability Act, and cannot maintain a suit for damages thereunder.

The judgment of an intermediate appellate court of a state is reviewable on certiorari by the Supreme Court of the United States where the highest court of the state has power to review the judgment, but denies a petition for such review.

Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Rock, Adv. Op. 418; Sup. Ct. Rep. Pol. 49, p. 363.

The respondent here brought suit under the Federal Employers' Liability Act and recovered judgment in an Illinois court for $15,000, against the petitioner, an interstate carrier. The Appellate Court affirmed the judgment and the Supreme Court of Illinois denied a petition for review of the case. The respondent urged that this judgment was not one of the highest court of the state, and hence not reviewable by the Supreme Court of the United States. The latter Court, however, ruled otherwise, granted certiorari and reversed the judgment in an opinion delivered by MR. JUSTICE BUTLER.

He first considered briefly the jurisdictional question, pointing out that the Supreme Court of the State had jurisdiction to review the case but had denied a petition so to do. Citing *William v. Bruffy* the Court said:

> The judgment is reviewable here. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach."

A consideration of the merits disclosed that the respondent had obtained employment with the carrier by misrepresentation. He had been refused employment on account of his physical condition, but later applied again and had another person impersonate him at the physical examination. By this means he obtained employment. Under these circumstances the Court took the view that he was not an employee entitled to the protection of the Act.

> The Act abrogates the fellow-servant rule, restricts the defenses of contributory negligence and assumption of risk, and extends liability to cases of death. And respondent in this action seeks, in virtue of its provisions and despite the rules of the common law, to hold petitioner liable for negligence of his fellow servants and notwithstanding his own negligence may have contributed to cause his injuries. Since the decision of this Court in the *Second Employers' Liability Cases*, 223 U. S. 1, 48, 51, it has been well understood that the protection of interstate commerce and the safety of those employed therein have direct relation to the public interests which Congress by that Act intended to promote. . . .
>
> The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the Act. . . .
>
> Respondent's position as employee is essential to his right to recover under the Act. He in fact performed the work of a switchman for petitioner but he was not of right its employee, within the meaning of the Act. He obtained and held his place through fraudulent means. While his physical condition was not the cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy.

The case was argued by Mr. Henry S. Mitchell for the petitioner and by Mr. H. H. Patterson for the respondent.

Due Process—State Regulation of Gasoline Storage Tanks

It is a debatable question whether the storage of gasoline and similar inflammable liquids is safer in tanks above ground or under ground and an ordinance requiring tanks for such storage to be underground will not be enjoined as arbitrary and unreasonable.

Standard Oil Co. et al. v. Marysville, Adv. Op. 445; Sup. Ct. Rep., Vol. 49, p. 430.

The Court here considered the validity of an ordinance of Marysville, Kansas, requiring petroleum products or other inflammable liquids to be stored in tanks at least three feet underground Storage tanks of crude oil, distillate, or fuel oil up to 500 gallons, and of gasoline, kerosene or naptha up to 10 gallons are exempted from the requirement. The district court enjoined the enforcement of the ordinance as to the petitioners' tanks, but the circuit court of appeals reversed this. On certiorari the decision of the latter was affirmed by the Supreme Court in an opinion delivered by MR. JUSTICE STONE.

The master who took testimony in the case had made findings from which he inferred that it was more dangerous to store the forbidden quantities of gasoline and kerosene underground than above. He accordingly concluded that the ordinance was so arbitrary as not to be a permissible exercise of police power. In this view he was sustained by the district court. The unsoundness of this, however, was pointed out by MR. JUSTICE STONE in the following part of his opinion:

> We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the

> duty and responsibility of decision. . . . To determine that the present ordinance was a permissible exercise of legislative discretion, as thus defined, we need not go beyond those findings of the master to which petitioners offer no serious challenge.

A review of the master's findings then appeared. He found that disastrous explosions and fires have occurred in connection with gasoline tanks, damaging property and injuring persons within a radius of 475 feet; that the principal business street of the town is within two blocks of the petitioner's tanks. The petitioners objected to the requirements of the ordinance, urging that "floating out" of underground tanks and electrolysis and corrosion caused by acid in the soil were likely to produce explosions and the contamination of underground waters. But a finding was made by the master that the soil there contains only a slight percentage of acid, that the tanks would be below the level of sewers, and that the soil was impervious to gasoline. He also found that explosions produced by lightning and danger from static electricity were less as to tanks underground, and that the base rate of insurance is 50 per cent less on tanks underground than above.

After summarizing these findings the unsoundness of the petitioner's contention that the ordinance was in violation of the Fourteenth Amendment was further stated as follows:

> The facts that the tanks of petitioners within the city limits have been operated successfully above ground; that appliances used by them are of the best type; that fires in connection with their many tanks located elsewhere have been relatively infrequent, and numerous others found by the master, were properly for the consideration of the city council in determining whether the ordinance should be enacted, but they fall far short of withdrawing the subject from legislative determination or establishing that the decision made was arbitrary or unreasonable. The passage of the ordinance was within the delegated powers of the city council, . . . and it acted within its constitutional province in dealing with the matter as one affecting public safety. . . . From the facts as found it might, in the exercise of a reasonable judgment, have at least concluded that the danger of ignition to the tanks placed under ground, under the conditions prevailing at Marysville, was no greater than when placed above ground and that in the event of ignition the hanger to life and property was very much less.
>
> We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. . . It does not preclude petitioners from locating their storage tanks without the city limits. Hence, the burden imposed upon them cannot be greater or otherwise more objectionable than that imposed by the enforced removal from cities by legislative action of dangerous or offensive trades or businesses.

The case was argued by Mr. Earl W. Evans and Mr. Thomas F. Doran for the petitioners and by Mr. Edgar C. Bennett and Mr. H. W. Colmerg for the respondents.

Fraternal Orders—Denial of Federal Right—Acquiescence—Laches

A fraternal order seeking, upon general principles of equity, to enjoin another order from using a name, constitution, emblems, etc., similar to its own will be barred by any existing equitable defences where the latter order does not compete with the former and is not guilty of any fraudulent intent, but enjoys its right to use the same by virtue of a federal statute under which it is incorporated. A state court may not deny indirectly the federal right of such other order by ignoring the fact that the claim of the order suing is barred by acquiescence and laches.

Ancient Arabic Order N. M. S. v. Michaux, Adv. Op. 577; Sup. Ct. Rep. Vol. 49, p. 485.

In this opinion the Court considered a controversy between the two fraternal orders having the same name of "Nobles of the Mystic Shrine," one having white members and the other negro members. The white order brought suit in a Texas court to restrain the other order from using a name, constitution, titles, emblems and regalia in imitation of its own.

Both orders are the outgrowth of masonic fraternities, each fraternity similarly having white members exclusively and negro members exclusively, as the case may be. These were organized in America many years ago, the white fraternity in colonial times, and the negro fraternity in 1784.

The white Order of the Mystic Shrine is a voluntary unincorporated association. The negro order is incorporated under an Act of Congress of 1870 providing for the creation of corporations in the District of Columbia. The full name of the white order is "Ancient Arabic Order of the Nobles of the Mystic Shrine for North America," and that of the other order "Ancient Egyptian Order of the Nobles of the Mystic Shrine of North and South America and Its Jurisdictions." Both have local temples throughout Texas—sometimes in the same cities.

The suit was originally brought by one local temple against another in Texas, but was broadened into one between the two national orders to restrain the negro order throughout the United States from using the name under which it acts, from designating its local lodges as "temples" and its members as "Nobles" or "Shriners," from giving its officers titles like those used in the white order, and from using a constitution, emblems and regalia like those of the white order and from organizing lodges in imitation of the complaining order.

The negro order answered denying that the white order had any superior right to the matters in question; denying that its imitation or use was for any wrongful or fraudulent purpose; and asserting its right to use the name under the Act of Congress, irrespective of any right to do so prior to such act; asserting that the two orders did not compete; and setting up laches and acquiescence as a bar to the equitable relief prayed for.

The court which tried the issues found that the imitative acts and practices constituted "a fraudulent deception" injurious to the white order and that the white order was not barred by laches or acquiescence and granted the relief sought. The decree was affirmed by the appellate courts of Texas. On petition the Supreme Court reviewed the case on a writ of certiorari and reversed the decision in an opinion delivered by MR. JUSTICE VAN DEVANTER.

He first stated the petitioner's contention that the decrees in question deprived it of its rights under the Act of Congress and was not in accord with the decision of the Court in *Creswill v. Knights of Pythias*.

The jurisdiction of the Court to review the case as involving a federal question was then asserted in the following language:

> The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their

petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support.

The views expressed by the Texas Court were then reviewed and found to be based not on any state statute excluding the defendant lodge, but on principles of general equity. It had not wholly refused to recognize the right set up by the negro order under the federal statute, but apparently had taken the view that the white order had acquired superior rights by prior adoption and use of the constitution, name, emblems, etc., and that in the absence of laches or acquiescence the white order was entitled to relief. It then held that neither element was present to bar that order. To this latter question the Supreme Court gave particular consideration, saying:

> There is no evidence of a fraudulent intent on the part of the negro order, or of a purpose on its part to induce any one, whether mason or nonmason, to believe that it was the white order or that they were parts of the same fraternity. On the contrary, it is shown that the negro order always held itself out as entirely distinct from the white order and as open only to members of the negro masonic fraternity. True, there was much imitation, but this is shown to have been in the nature of emulation rather than false pretense.

The opinion further reviewed the record to point out that the activities of the negro order had long been known to the public generally and had been openly commented on by officers of the white order. For at least thirty years it had knowledge of the activities of the negro order and had taken no action against it.

> "Thus it is established that from the beginning the white order had knowledge of the existence and imitative acts and practices of the negro order. In addition, the evidence indubitably shows that with such knowledge the white order silently stood by for many years while the negro order was continuing its imitative acts and practices and was establishing new lodges, enlarging its membership, acquiring real property in its corporate name, and investing substantial sums in the copied paraphernalia, regalia and emblems. It also is shown by the uncontradicted testimony of several witnesses—one a life member of the white order—that a large proportion of the copied paraphernalia, regalia, emblems and insignia used by the negro order, its lodges and members was purchased from or through members of the white order, and that in one instance a lodge of that order, preparatory to moving to new quarters, sold the paraphernalia and regalia used in the old quarters to a lodge of the negro order in the same city.

Some emphasis was placed also on the fact that the negro order had established many local temples and had acquired considerable real and personal property.

The opinion was concluded as follows:

> What we have said of the evidence demonstates, as we think, not only that there was obvious and long contined laches on the parts of the white order, but also that the circumstances were such that its laches barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order. . . . As it is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained, the decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

The case was argued by Mr. Harold S. Davis for the petitioners and by Mr. Claude Pollard for the respondents.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

PRINCIPLES OF JUDICIAL ADMINISTRATION, by W. F. Willoughby, 1929. The Brookings Institution, Washington, D. C., XVII, 662 pp. $5.00—The National Commission on Law Observance and Enforcement, appointed by the President, has been convened and there has just appeared from the pen of one of the most scholarly students of government, Dr. W. F. Willoughby, Director of the Institute for Government Reserch, the volume under review.

The commission may take years for its study and report, but to the serious-minded legislator, executive, judge, lawyer or student, here is the problem set forth in detail and with a documentation and assembly of the studied discussions of thoughtful men, committees, commissions and groups, made particularly during the past twenty years, most unusual in scope, clarity and precision of expression. The volume is not only readable to those versed in the law but understandable to the man of business, and to that unidentified individual commonly described as Mr. Average Citizen, he who pays the bill of wasted public funds, the costs of the law's delays, and all the concomitants of what is generally recognized as our most inefficient administration of justice.

True, the author of this volume contents himself, in the main, with describing our system, or lack of system; with outlines of methods and machinery and summation of many faults and weaknesses, without many attempts to ascertain the *why are we so*. The accomplishments of this volume are extraordinary, nevertheless.

If each executive, legislator and judge throughout the country could be required to study and follow the suggestions in this volume and test each present statute by the yardstick of the principles here set forth, as well as all proposed legislation, perhaps most of our criminal statutes would be repealed, and the remainder consolidated within understandable compass—certainly

we would have an end of poorly considered and hodge-podge enactments, the construction of which so confuse the citizen and consume the time of our courts.

A distinguished scholar recently wrote:

"To-day it is from the law-maker rather than from the law-breaker that our American traditions of self-government have most to fear."

We have a Congress of more than five hundred members. We have state legislative bodies in forty-eight states consisting in the aggregate of more than 7,000 members, and aldermen, supervisors, trustees and selectmen in more than 16,000 incorporated cities and towns, and 3,000 counties, all more or less actively engaged in making laws.

Laws governing personal conduct, as well as those relating to other matters, are subject to the commercial law of "supply and demand." When statutes, rules and regulations are too voluminous they tend to become as valueless as German marks after a printing press debauch. This condition explains much of the present so-called lawless attitude of our people. It is not the desire to be a law-breaker, but the recognition of the impossibility of obeying the multitude of laws that tends to destroy respect for all law, and to produce the habit of mind to "take a chance."

The situation is much like the celebrated comment of Mark Twain concerning the weather:

"Everybody talks about it, but nobody seems to be doing anything about it."

This volume should do much to a clarification of the entire subject. It is enriched by an illuminating bibliography and a thorough index.

NATHAN B. WILLIAMS.

Washington, D. C.

Marriage Laws and Decisions in the United States: A Manual, by Geoffrey May. Russell Sage Foundation. 1929. Pp. 477. $3.50.—Written as a companion volume to Richmond and Hall's *Marriage and the State,*[1] Mr. May has compiled this digest of the laws and decisions affecting the marriage contract and its nullification, as they apply in each of the various states and the District of Columbia. Covering all the state and federal laws as they stood at the close of 1927, and all court rulings in print in January, 1927, the manual should be a valuable handbook to social workers, who so frequently need to understand the legal aspect of their clients' marital relations.

As a convenient reference, it is all that it purports to be, an analysis of the laws in each state following a uniform outline with six general headings. These are (1) The Marriage License, (2) Solemnization, (3) The Marriage Record, (4) Other Requisites (a general heading including various topics, namely, the degree of consanguinity within which marriage is allowed, the racial status required, those legally eligible for marriage, and laws regulating consent), (5) State Supervision, (6) Interstate Relations (regulations affecting marriage performed in other states), and (7) Sex Offenses and Marriage (e. g., provisions in respect to prosecution for sex offenses when marriage takes place). Following the digest of the laws in each state references to the court decisions bearing on each law are cited. From the legal point of view the book should be an unusually satisfactory reference.

However, from the standpoint of scientific interest a final chapter summarizing briefly the type of laws existing in the various states would have been a welcome addition, and would have rendered a real service to those interested in the general subject of marriage legislation. Such a chapter would have given a more definite picture of the prevailing lack of uniformity in marriage laws. The author did see fit to append a table on "The Relationships Within Which a Man Is Prohibited from Marrying," according to the different states. Similar tables as to minimum age regulations, physical examinations, the recognition accorded common law marriages, reasons for annulment and the like would have been of equal interest and would have greatly enhanced the value of the manual to the average person consulting it.

MABEL A. ELLIOTT.

Northwestern University.

Opinions of the Commissioners Under the Convention of September 8, 1923, Between the United States and Mexico. (Government Printing Office, Washington, 1927: pp. 482.)—The study of the opinions of an international arbitral tribunal is always interesting and profitable, for those opinions are, on the whole, the fairest and most authoritative expression of the law of nations as understood by experts specially selected to pass on questions involving that law. The ultimate object of an arbitral court is to determine whether the conduct of one State or its nationals toward another State or its nationals involves such international delinquency as will render that State responsible in international law to the injured State; or, to put it in the words of the Commission in the North American Dredging Company's Case (p. 23), the court must seek for a "proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other." The responsibility of a State in international law is admittedly either *direct,* as when it is the result of the acts of the government itself, or its officials; or *indirect,* as when when it arises from the failure of the judicial authorities to take proper steps against a private individual or executive official who has caused damage or loss to the nationals of a foreign State (the B. E. Chattin's Case, p. 426). The United States-Mexico Claims Commission, although a court of limited jurisdiction (p. 16), has had the good fortune to deal with a large variety of questions involving both international and municipal law. In most of the cases submitted to the Commission by the American Agent, we find, in the accurate words of Commissioner Neilsen (p. 130), "odious features of discrimination prompted by prejudice against aliens." The range of questions dealt with by the Commission may be judged from the following: judicial misconduct in bankruptcy proceedings; confiscation of property rights; illegal exaction of consular fees; mistreatment of consular officials; claims growing out of the contractual obligations of a State; denial of justice in its various aspects; questions relative to the admissibility and sufficiency of evidence; international standards of justice; right of diplomatic intervention; responsibility for acts of the judiciary; military occupation, and a multitude of others. Commissioner Neilsen made in the Laura M. B. Janes' Claim (p. 123) the important statement that: "International Law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamentally grounded on the often asserted theory that an injury to a national is an injury to the State to which the national belongs."

1. Russell Sage Foundation, 1929.

Most, if not all, the South American republics have welcomed the so-called Calvo clause as a refuge from the consequences of this right of diplomatic intervention. The clause amounts, in substance, to a denial of this right of intervention in respect of State liabilities founded either on contract or on civil war, insurrection, or mob rule. The North American Dredging Company's Case (p. 22) quotes in full one of the most usual forms of this clause, and by its terms the individual agrees to consider himself a national of such foreign country in all matters "concerning the execution of such work and the fulfilment of this contract." But the most objectionable feature, and the one least admissible from the point of view of international law, is that part which binds the alien to waive all his rights as "aliens, and under no condition shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract." The true effect of the Calvo clause has been considered before by international tribunals, and their opinions are by no means in harmony on this point. In the reviewer's opinion, the analysis of this doctrine in the American Dredging Company's Case (pp. 21-34) is one of the best considered and most rational to be found in the reports of international arbitrations. The Commission said (p. 25): "Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizens can not by contract tie in this respect the hands of his government." "Whenever," adds the Commission (p. 31), "such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void." "But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim." Under the view taken by the Commission in this case, the Calvo clause cannot serve as a haven for the irresponsible and illegal conduct of any government, and the qualification that recourse must first be had to local remedies adds, in reality, nothing new to the system of international jurisprudence as understood prior to the enunciation of that doctrine by the eminent Argentine. The Commission has, to the reviewer's mind, expounded this doctrine in its true and only allowable sense.

The opinion of the Commission in the George W. Hopkins' Case (p. 42) is noteworthy for the way in which it handles the delicate question of the responsibility of a State for the acts of an unrecognized *de facto* government, such as that of General Huerta in Mexico during 1913-14. It will look to the "substance rather than its form, a substance which is not difficult to discover notwithstanding the flimsy garb of constitutional power under which it undertook to masquerade." (p. 43). A government may come into power either by operating directly on the central authority by seizing the reins of the government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation (as did Huerta); or, by attacking the existing order from without and step by step working toward the center. "The acts of an organization of the latter type become binding on the nation as of the date territory comes under its domination and control *conditioned* upon its ultimate success." (p. 48).

The conclusions of law arrived at by the Commission deserve the closest study by the student of international law and relations. As individuals, the commissioners displayed remarkable fairness and impartiality in their deliberations. The reviewer cannot read these opinions without concluding that they furnish another eloquent instance of the efficacy of international arbitration as so far the most rational and advanced method of adjusting differences between States. Just as in the early constitutional struggles of our own country the Supreme Court could be depended upon to settle private differences along the lines of strict legal principles, so specialists on international law who are selected to sit as arbitrators on Commissions of this sort can be trusted to build up a body of law that will meet with the universal assent of civilized governments. By all means let us encourage international arbitration.

JULIUS I. PUENTE.

Chicago.

Occasional Addresses, by Henry H. Wilson. Lincoln, Nebraska: Jacob H. North & Co., 1929. Pp. 445. —The title of this book minimizes its real worth. The book is a collection of well written articles upon topics of interest to lawyers, students of government, Masons, and, perhaps, university professors. While, with a few exceptions, each article was delivered as an address for some particular occasion, the title "Occasional Addresses" might connote less scholarly material than is found in this book.

The author was for thirty years a member of the faculty of the College of Law of the University of Nebraska, and his scholarship and thought as portrayed in his various articles is such as one would expect in a discussion by a teacher in a first class law school of his generation of the subjects concerned. The article entitled "The Jury System" might re-assure those who have investigated the teachings in many "modern" law schools that there are some still living who believe that the jury is a justifiable institution, unless the author has changed his view. This article was published in *Popular Science Monthly* in 1884. The articles, "Influence of Roman Law" and "Relation of Law to Society" will prove of interest.

University problems come in for their share of discussion under such titles as "Ideals of Higher Education," "The Trials of Professors for Sedition," and "The State as an Educator." There is a section of addresses on Masonic occasions, and one on "The Last Thirty Years in the Caribbean," and, what might startle the reader as a Nebraska production, an address delivered in 1893 entitled "The Gold Standard."

The book will prove of interest to any reader, and offers such a variety of topics that one reads it with the same satisfaction that he does *The Reader's Digest*, with the additional interest of following the

workings of one man's mind from his graduation oration in 1878 through his thoughts upon problems of the day over a period of an active life to 1928, a span of fifty years. The writer cannot help but regret the unfortunate title given to the book because it is much more worth while than that title would indicate. The range in time of the addresses, the thought of the day of each so well expressed, the care with which they are written, and the scholarship of the author makes their collection into one volume worth while.

LELAND STANFORD FORREST.

Des Moines, Iowa.

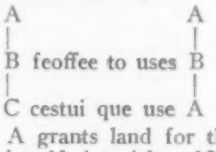
Der Trust in seinem Entwicklungsgang vom Feofee to Uses zur amerikanischen Trust Company, von Hermann M. Roth, in Heymann's Arbeiten zum Handels-, Gewerbe- und Landwirtschaftsrecht. Marburg, Elwert'sche Verlagsbuchhandlung, 1928. 320 pp.—The above work is a valuable contribution to the development of the present trust company from its earliest origins. While many scattered works such as those of Maitland, Pollock, Reeves, Digby and others give, if anything, in greater detail than does Dr. Roth, the historical background of the modern trust, and modern writers give a much more complete account of the present legal situation of trusts and trust companies, there is probably no work either in German or English which treats in such complete fashion the whole development.

The fields farthest away are always the greenest and it is, therefore, not surprising that the author is enamored of the unbroken historical development and elasticity of Anglo-Saxon law. Those, however, who live under the common law realize its weaknesses and that the very fact of its long history has given rise to peculiarities, elaborate technicalities, and other unevennesses which have brought it about that our law has become unduly complicated and cumbersome. In many respects it is in need of a revamping so that, as the late Lord Bryce put it, the law of the twentieth century should not be burdened by the safeguards needed in the thirteenth and fourteenth centuries. Our law is a nice old lady and like many nice old ladies it has many whims and fancies, though for the casual observer she may appear to be a delightful, calm dame. In England an omnipotent parliament was able in the last century to modernize this law in many respects, but we, with our forty-eight state legislatures and a federal Congress, find it more difficult to make ourselves free of the trammels of old age.

Perhaps very few legal developments of the common law are more complicated, more interesting and in many respects more illogical than those relating to our modern trust laws. On the other hand, it must be admitted that the elasticity of English law has in this instance been a great advantage for, as the author shows, it has produced an institution most desirable for modern conditions which it has been very difficult to fit into the scheme of the legal codes of the European continent. Obviously, the more modern part of the treatise is designed for German readers and consequently many phases of the modern trust which are commonplace to us are treated at greater length than would be necessary in a book designed for those trained in Anglo-Saxon law.

As regards the more historical part which constitutes the larger portion of the book, the author falls into the error frequently made by lawyers treating of history. There is altogether too much of a desire to have a logical development and there seems to be an assumption that in a simple society there were the same legal complexities as under more modern conditions. The reviewer doubts very much whether the whole system of uses as it appeared in the Middle Ages in England had really any basis either in Roman law or in the older Germanic laws. It would seem to this reviewer that the whole system arose from a desire to evade regulations which forbade the Church to acquire property. There was not a similar development on the European continent because the Church generally speaking was able to avoid governmental supervision for any long stretches of time. This was especially true in Germany where the great prelates became practically independent sovereigns. Ever since the days of Henry II difficulties had been placed in the way of the Church acquiring land freely in England. On the other hand, large numbers of people when about to die were anxious to win the favor of the all-powerful Church by leaving property to it in order to win its intercession with the divine powers when death had taken place. We find these various prohibitions summed up in the famous statute "de religiosis" of 1279, which forbids the acquisition of land by the religious or others in such wise that the land should go into mortmain. As a matter of fact, similar provisions had appeared at the parliament of Oxford in 1258. What more natural in view of these circumstances, however, than that the land would not be left to those through whom it would go into mortmain but to some individual who would agree to use it for certain definite purposes? Taking the simple state of affairs which prevailed in England in the days of Edward I, the dying man leaving his property to his neighbor to be used for the salvation of his soul, generally speaking relied upon the penalties with which the Church would threaten the one who did not carry out the trust. It is, therefore, also quite natural that, when this whole practice develops, the Court of Chancery, which after all, was an ecclesiastical body, should be the one to see that such trusts should receive the protection of the courts. The author, himself, is not unmindful of the fact that such may have been the development, because on page 27 he really contradicts some of his earlier statements, pointing out that the mightiest institution of those times, the Church, held its protecting hand over these arrangements and compelled their carrying out. Quite correctly he indicates that "testamentum" and "fidei laesio" fall under ecclesiastical jurisdiction. Compelling the trustee to fulfill his trust, it helped to save his soul.

The reviewer is not able at all times to understand clearly how the author pictures to himself the succession of events. It seems to the reviewer that in several instances conditions of the fourteenth century are confused with those of earlier days. Before 1290 when there is a change as a result of the statute of Westminster III (*quia emptores terrarum*) the whole arrangement of uses was very simple and might be illustrated by the following diagram:



In other words, A grants land for the use of C or for the use of himself A. After 1290 the lords of manors, finding that in too many instances this method of deeding property had been used to avoid feudal obligations on the part of vassals, sought to prevent a

further alienation. Henceforth any freeman was to be allowed to sell his property in whole or in part, but the buyer was to hold of the seller's lord and not of the seller. Before 1290 C held of B but now C was to hold of A. The change might be indicated by the following diagrams:

The main object was to protect the great lords, since as a result of the old process of subinfeudation the profits of wardship, marriage, and escheat had been diminished, B in our diagrams profiting at the expense of A. Henceforth both B and C were to pay their dues directly to A. On the whole, this statute of Westminster tended to prevent the further development of feudalism in Great Britain.

Of course, there were really three methods of evading the laws intended to curtail mortmain, and the same is true of entails. These were "recoveries," "fines" and "uses." "Uses" have been discussed. "Recoveries" and "fines" were collusive. In the case of recoveries the pretended defendant defaulted by arrangement and the land was awarded to the plaintiff. In the case of "fines" or "final concord," by an arrangement before the suit the two parties at law pretended to come to a settlement in court and this was confirmed by a judgment. The greatest method, however, remained "use," which is the key not only to the development of the modern trust but also to the complicated system of land holding in England. As indicated, it probably originated as a result of ecclesiastical needs and especially those of the Franciscans in the thirteenth century. It is fully developed by the time of Edward III (1327-1377). When A conveyed land to B for the use of the Church, the legal title was vested in B but the Church occupied the land and derived all the profits. B was recognized as legal owner but he held the land only in trust and did not use it. The system was used not merely to enable the Church to evade the laws against mortmain but also to evade feudal dues or creditors, or in the case of civil disturbances to avoid possible confiscation. By the middle of the fifteenth century half the land of England was held in this fashion. As late as the fourteenth century the cestui que use would have to trust the conscience of the feoffee to use, but when under Henry V (1413-1422) the Chancellor got jurisdiction over all cases relating to uses the equitable rights of the user began to be enforced and the Court regarded the feoffee bound to hold in trust. The doctrine had advantages and disadvantages. It broke the bonds of rigid feudalism but on the other hand it made the transfer of land too easy, as it might be done in secret or by word of mouth. There was no registration or formal delivery of seisin. Thus titles to land could not be verified and fraud was made relatively easy.

The above has been given at such length because it is in this phase of his treatment that Dr. Roth seems to the reviewer to be somewhat confused. From then on his account is perfectly clear. He shows well what the ultimate results of the Statute of Uses of 1535 were. This statute sought to unite the real and nominal ownership but its ultimate effect was merely to interpose another link in the chain so that A, while he could not convey to B to the use of C, could convey to B to the use of C for the use of himself or some other person. In other words, this statute was effective against one use but not against two.

Those who can read German readily and are interested in the history of English law will find the book well worth while. The reviewer questions, however, whether it would pay to translate it into English, for, after all, the historical part is treated more clearly and comprehensively in works in English, and the latter or modern part is hardly meant for the American or English student of legal affairs.

WALTER LICHTENSTEIN.

The First National Bank of Chicago.

The Book of English Law, by Edward Jenks, Boston: Houghton, Mifflin Company. 1929. Pp. xviii, 439. $5.00.—Dr. Jenks, with skill and clearness, has written an account of English law. Lord Atkin, for the last ten years a Lord Justice of Appeal, writes the foreword and explains that the book is designed for the use of those undergraduates of a university who feel that a knowledge of elementary law may be a part of a liberal education. In other days Fortescue, Locke and Blackstone, Sir William Anson, Dicey and Maitland had non-professional readers.

Happily the volume is not practical—by which is meant that it does not attempt to give the layman ideas for the conduct of his own affairs. With swiftly moving pen the author traces the history of institutions and the reasons for rules, accomplishing, the reader likes to think, for this age, what the commentator Blackstone did for his. Those who gain their first impressions of law from this volume will miss the echo of the great name, but they will understand better what changes in the law the last two hundred years have brought. Necessarily the story is told in passing and not in sufficient detail to detain the research of the scholar.

The American lawyer whose daily thought is directed to fragments rather than to the pattern of the whole will feel grateful to Dr. Jenks, who has added to other gifts from his generous pen this readable and vital summary, including, here and there, things almost forgotten. The American lawyer will be interested to note again our departures from the English system. One cannot help being impressed with their distinctive terminology—quaintly reminiscent of dead days. One feels that differences in substance persist because life in England is one thing, and life here another, and that in both places the law is a living thing, changing not only with institutions but with shifting thought. Two centuries hence this text may sound as archaic as Blackstone's does today. John Austin, who in his zeal and scholarship sought rigid concepts and settled ways, was one of the pioneer scholars of English jurisprudence. John Austin is dead seventy years this summer and to Dr. Jenks and many of us he seems to have written on sand.

MITCHELL D. FOLLANSBEE.

Chicago.

The Relation of Thomas Jefferson to American Foreign Policy 1783-1793, by William Kirk Woolery. 1927 Baltimore; Johns Hopkins Press. Pp. viii, 125. Pp. 1-128.—In seven chapters, dealing with Post-war Commercial Commissions, Negotiations with the Barbary Pirates, French-American Commerce, the Consular Convention of 1788, Treaties Obstructed, British and French Treaties, and Neutrality, the author examines the major aspects of Jefferson's career as a diplomat. A doctoral dissertation, the theme is of more

than average interest, and it is handled in a fashion to please the international lawyer and the historian, though the general reader will find it too compact. The sources utilized, primary and otherwise, are numerous, and the apparatus and methodology are highly scientific. From it all the reputation of Thomas Jefferson emerges with an undiminished, perhaps an added, lustre.

As minister to France, Jefferson found his duties to be more consular than diplomatic, for, as the author very interestingly observes (p.40,) "it fell to his lot to become the first diplomatic agent of all time to apply the principles so recently set forth by Adam Smith in the 'Wealth of Nations' ". The author says of the consular convention which Jefferson drew up with France that "Jefferson's knowledge of the law, and his sincere devotion to its unimpaired maintenance, caused him to reach in this negotiation the highest point of technical service that he performed for the United States during his mission to France" (p.65.)

Contrary to general opinion, the slight progress in treaty making during the "Critical Period" is attributed (p.66) as much to Congressional as to European indifference. In the Nootka Sound crisis of 1790, Jefferson is declared to have been willing to fight Great Britain, had Spain and France been prepared for a vigorous joint offensive (p.88.) Nevertheless the author finds in Jefferson an early proponent of neutrality, though not in fullest sympathy with Washington's Proclamation of April 22, 1793. Jefferson's relation to the crisis precipitated by Genet is interestingly traced. It would appear that in this episode Washington was rather badly served by his Secretary of State.

The author assigned himself a work of erudition. In this he was successful, and by this standard his work should be judged. Yet one misses, somehow, the passion of the times, the personal touch. And this is the more to be regretted because Jefferson, of all men, believed in the personal equation in diplomacy and held that to choose *personas gratas* was the prime essential to negotiation.

LOUIS MARTIN SEARS.

Purdue University.

The Virginia Constitutional Convention of 1901-1902, by Ralph Clipman McDanel. Baltimore: The Johns Hopkins Press, 1928. Pp. vii, 166.—Professor McDanel's book has a very timely interest. The recent substantial changes in the Virginia Constitution have naturally directed attention to the instrument which needed amendment and to the Convention which framed it, since one may wonder why a constitution composed after so much labor should so soon need material revision. Professor McDanel does not address himself directly to this problem. His book furnishes, however, a careful study of the Convention and of its leaders. It also presents the political background of the Convention and a consideration of the chief difficulties with which it was confronted. One reaches the conclusion from this book that the recent need for change was not due to a lack of ability in the Convention, though its work seems now to have been often unduly conservative and restrictive. If an answer needs be found to the problem suggested it may lie largely in the great changes which a quarter century has brought and in the quite general practice of putting in the organic law provisions which are more properly of legislative concern, a practice which is now not without some national sanction.

The scope of this work is somewhat broader than its title might indicate. The discussion is begun by a brief review of certain outstanding facts in the political history of Virginia and of the events leading to the meeting of the Convention. There is also included comment on the practical effectiveness of certain provisions as shown in subsequent events. Such results are patricularly interesting when compared with those hoped for by the framers of the Constitution. In connection with the actual work of the Convention, no effort is made to review the adoption of each of the many provisions. Rather, attention is directed to those portions which are of outstanding importance, as the parts dealing with the suffrage question and the Corporation Commission. There is likewise a chapter devoted to the departments of government.

The matter of chief concern at the time of the Constitutional Convention and one which was largely responsible for its existence was the suffrage question. Charges of fraudulent disfranchisement of the negro have been frequently made and much less frequently proved. Quite naturally, such charges normally come from partisan sources and often exhibit more of the partisan spirit and the reformer's zeal than a calm judicial weighing of facts. Professor McDanel presents the various angles of the suffrage problem in careful and impartial manner. He also reviews the suggestions of election fraud existing before the Convention, which led to the desire for a better suffrage provision. The conclusions of the existence of fraud, where drawn, are not always supported by as concrete and reliable evidence as might be desired. But such evidence, in the nature of the case, is frequently unobtainable.

Well deserved praise is given the Convention's Committee on Corporations for its excellent work in drafting the provisions dealing with the Corporation Commission. In the sections dealing with the departments of government, no particularly radical changes were made by the Convention. Professor McDanel well summarizes this phase of the work and in the course of his treatment presents some interesting sidelights, as, for example, the social value of "court day" contained in the discussion of the abolition of the county court system. The problem confronting the Convention in determining whether its handiwork should be proclaimed or submitted to the electorate for acceptance or rejection is carefully considered. Recent Amendments to the Constitution, some of which were proposed but apparently not adopted when the volume under review was written, are mentioned rather briefly. The author ends his work with a definite statement of his conclusions; summing them up in the words of Senator Daniel that "it was a pretty good Convention after all."

Professor McDanel's book is an authoritative and readable account of an important period in the political history of Virginia. It is also a thought provoking discussion of the drafting of a state constitution which should be of wide interest among students of state government. The book is thus a valuable addition to the literature of Virginia political history and of state constitutional law.

F. D. G. RIBBLE.

University of Virginia.

AARON BURR—THE LAWYER

A Tragic, Romantic and Misunderstood Figure—Eminence at the Bar—First American Lawyer Who Undertook Really to Prepare His Cases Before Trial. Sometimes Associated with Hamilton but More Frequently on Other Side of Case—Success in Appellate Court Practice—High Lights in Political and Personal Career*

By John T. Barker

Member Kansas City (Mo.) Bar; Former President Mo. Bar Association

THE most tragic and yet romantic figure in American history is Aaron Burr. The man most misunderstood is Aaron Burr. The man least known is Aaron Burr. At one time within one vote of being the President of the United States; the next moment dragged as a felon before a Virginia court presided over by Judge Marshall. One hundred years after his death the most attractive and challenging personality of this country and also thought to be the most unsuccessful and disappointing personality known to history.

Little has been written of this man except by those actuated with a desire to destroy his memory. No true biography may be written today because so little has been handed down about him, and yet it has become known that that which has been written about him is, in many instances, untrue. For one hundred years every school child has been taught that he was a traitor to his country, and yet every man of learning knows that his heart beat for America and that he was intensely patriotic.

It is now known that he was never actuated with a traitorous intent, but wanted to conquer Mexico in order to attach it to American soil. His fight was for Texas, but he fought too early. What he tried to do was called treason, but less than fifty years afterwards when Texas was taken from Mexico, the act was applauded.

Much is known of this man as a statesman and politician, but little is known of him as a lawyer. He was one of the leading lawyers of the United States during his day, and yet little is said of his victories. He was really the first great American lawyer, and yet most writers say he was not a great lawyer, but only a successful advocate. If the winning of cases means a good lawyer, Aaron Burr was the master of all of them.

Let us look into the life of this strange and weird man and in order to discuss him as a lawyer, it is necessary to discuss his entire life. Born near Princeton on February 6th, 1756, the son of Rev. Aaron Burr, the first President of Princeton College, and Esther Edwards, daughter of Jonathan Edwards, the second President of Princeton College, and one of the greatest ministers in the early days of this country. No better blood flowed through the veins of any man of this continent than that which flowed through the veins of Aaron Burr. His father died when he was one year of age and his mother when he was two years of age. Within twelve months he had lost his father, mother, only sister, grandfather and grandmother, and he was thereafter reared by an uncle, Timothy Edwards, one of the most distinguished men of New England. At the age of eleven years Aaron Burr applied for admission to the Freshman Class at Princeton, but was refused on account of his youth. After studying at home for two years and at the age of thirteen he was allowed to enroll in the Sophomore Class and at sixteen he was an honor graduate. It was natural that he should take theology or the law and he chose the latter, but before having an opportunity to study law the Battle of Lexington awoke within him the patriotic thought of liberty for the American Colonies, and he presented a letter from John Hancock to General Washington, recommending him for service. After waiting for several days he became impatient and when it was learned that Colonel Benedict Arnold was enlisting men for an expedition against Quebec he offered his services and joined that immortal venture.

Two commands marched against Quebec; one under General Schuyler and one under Colonel Arnold. Upon Schuyler becoming ill, his command was given to General Richard Montgomery, who had once served under Wolfe. General Montgomery's expedition met with wonderful success and finally reached Montreal. Arnold marched straight to Quebec through the State of Maine and across that unknown territory by way of the Kennebec and Shaudere Rivers.

The soldiers under Arnold were the very flower of American manhood. For nearly two months they crossed swamps amid heavy rains and snows. They faced the peril of swollen rivers and bewildering trails and were exposed for days to bitter weather. Their supplies failed and yet they kept on. Perhaps no other adventure in American history equalled Arnold's march on Quebec. Montgomery was to join Arnold before Quebec for a combined assault. Burr, disguised as a Catholic Priest, was selected to carry the message to Montgomery, asking a joint attack. Finally in December, 1775, a joint attack was made in a very heavy snow and windstorm. This attack was repulsed by heavy artillery and Arnold's and Montgomery's men lay dying in the snow. Montgomery fell mortally wounded, but Burr rallied the column and proceeded through a storm of shot and shell to rescue his commander and carried his body to safety behind the American lines. Smallpox became prevalent and the whole army was finally

*Address delivered before the Missouri State Bar Association at Hannibal, Mo., May 19, 1928.

without money and supplies. Burr was sent to Montreal and finally was directed to return to the Colonies, which he did.

His fame as a soldier and the prominence of his father and grandfather had attracted the attention of the American people to such an extent that General Washington, Commander of the American troops, solicited him to become a member of the staff, which he did, and thereby became a member of General Washingtons official family. There for the first time he met Alexander Hamilton, who was also attached to General Washington's staff. How tragic that these two brilliant youths should have come together under the roof of the future President of the United States! Burr was a natural soldier and liked active duty. Hamilton was more retiring and liked the business end of war because there his great faculties could be extended. Burr chafed for action and grew restless and impatient. He did not seem to enjoy his association with General Washington and later procured a commission as aide to General Putnam with the rank of Major. Did these two young men, during the time they were under Washington's roof, imagine and conceive dislikes for each other? Had they never met and both served in Washington's official family, would the duel years afterwards have taken place? Was that the beginning of their dislike and distrust of each other? Hamilton was the favorite of Washington because of his tremendous ability to organize. He was a master of detail and was of great service to the Commander-in-Chief. Did Burr feel that General Washington slighted him in his preferment for Hamilton? History does not record the relationship of these two young men during the time they were with Washington. One liked the planning of war, the other liked execution. It was natural that they could not agree. Some say that Washington finally became hostile to Burr over some love affair which took Burr too often away from the army. Others say that Washington was very fond of Burr and in later life he so expressed himself many times.

Burr continued on General Putnams staff until appointed Lieutenant-Colonel of another regiment, the youngest officer in the army with such a rank. His most conspicuous deed was in repulsing the British army, which had invaded New York State under Governor Tyron. His soldiers simply worshipped him and all of his estate was given away to soldiers in need. He was a natural leader and his men followed him without question. After wintering at Valley Forge he was in the Battle of Monmouth where his horse was shot from under him. He was selected by General Washington for the very confidential mission of ascertaining the activities of the British troops in and around New York. He became ill and asked General Washington to give him leave of absence without pay, which Washington refused to do, but ordered him to take all of the time he wanted with full pay. The strain of war became so trying on him that after five years of active service he presented his resignation to Washington, who accepted it with an expression of regret. Except for a slight service thereafter in attempting as a volunteer to protect New Haven, where Yale College was located, his soldier days were over.

He had become more or less embittered against General Washington and never thereafter cared for him. This dislike ultimately led him to become one of the great leaders against the party of Washington and to manage and direct the candidacy of Mr. Jefferson; thus sounding the death-knell to Washington's party, which never again came to life.

Whatever may be said of Burr in later life, historians all agree that he was intensely devoted to the cause of American freedom; that he did more than his part to sever the cord which bound this country to England; that his five years of service were brilliant and faithful; that he enlisted as a youth, the owner of a large estate, and that he came out of the war at twenty-three years of age, broken in health and completely impoverished; that he financed his regiment and gave all that he had for his country. Had he died then he would have been nearly as great as Washington. He came out of the army the idol of the American soldiers and his future was assured. No man had done more for his country and no man was more admired.

Colonel Burr was an invalid for many months after the close of the war and while recuperating was paying attention to Mrs. Prevost, the widow of an English officer ten years his senior. Upon becoming strong enough he started to study law with Judge Patterson of New Jersey, who was too busy to tutor him, and he concluded to take up his duties with Thomas Smith in Haverstraw, whose business had been suspended by the war and who had plenty of time to devote to Burr's teaching. Burr lived in the law, often spending the entire day and night at his studies. After reading law for six months he concluded to apply for admission before the Supreme Court at Albany, but found a rule requiring three years work before admission. He proceeded to Albany and presented his matter in person before the court, stating that he had started to study law before the Revolutionary War and that he should not now be denied the right of examination simply because his time had been given to his country. The rule was suspended and he was given a very rigid examination, which he passed without any difficulty, and settled down to the practice of law in Albany on the 17th day of April, 1782. The Tory lawyers were prevented from practicing law and Burr immediately built up a very profitable business and was recognized as one of the most rising young men in the state.

Three months after he started to practice law he married Mrs. Prevost. This lady had very little property and was not exceedingly attractive, but Burr was drawn to her through her intellectual attainments, she being one of the best educated women in America. No doubt he could have married into any of the rich families in New York, had he so chosen. But all historians agree it was a marriage of love, though not advancing Burr in either the business or social scale. As soon as peace was declared he moved to New York City and at once became the leader of that bar. He was the first American lawyer who undertook to prepare his cases before trial. He interviewed every witness, often working throughout the night, and was never surprised during the trial of any lawsuit which he had prepared. He completely mastered his case and it is said of him that he never lost a

single case which he himself had prepared. He refused to take many cases because he could see no merit in them. He investigated every case thoroughly and selected only those where he thought his client was in the right. If he was not one of the greatest lawyers in America, certainly as a practitioner at the bar his equal never lived. He was exceedingly ethical, although he often employed methods for the purpose of embarrassing his adversary. He once tried an ejectment suit and opposing counsel, anticipating that he would attack a will, built their whole case around the genuineness of the will only to find that Burr was attacking an ancient deed, and he thus won his case.

He and Alexander Hamilton were frequently on the same side, but more often opposing each other. In 1800 they defended Levy Weeks, charged with murder, it being one of the first mystery murder cases in New York, and within five minutes after the jury retired it brought in a verdict of not guilty. Another time he and Hamilton were defending a murderer and Burr came to the conclusion during the trial that the prosecuting witness was the murderer and that his client was innocent. He asked Hamilton to allow him to make the closing argument and finding that it would be at night, he had many candles brought into the room and several of them placed over by a large pillar where the prosecuting witness was sitting. After discussing the testimony in the case he picked up a couple of large candles, walked over to the prosecuting witness and, after throwing the light upon his face, denounced him as the murderer. It took such witness so by surprise that he immediately fell to the floor, confessed and was later sentenced.

Burr and Hamilton were both rivals for the legal business of New York. Apparently friendly, often visiting in each other's homes, nevertheless, each had his friends, and the town was about evenly divided. Hamilton was rather pompous and prided himself a great deal upon his legal learning. Burr was more democratic and devoted more time to studying the eccentricities of judges and jurors. He always knew of any prejudice held by a judge or juror and he always played upon it. His idea was to get on the right side of a lawsuit and then to win it. Hamilton would talk three or four hours, completely exhausting the case, and Burr would reply in thirty minutes, picking out two or three vulnerable points in Hamilton's argument. At one time they were on the same side in the trial of a very important case and it was customary for the leader of the case to close the argument. As both had been employed at the same time, neither of them could actually be called the leader. Hamilton, however, insisted upon making the closing argument and Burr graciously consented, but embarrassed Hamilton very much by completely exhausting the case, and knowing Hamilton as he did and anticipating what he would say, he made Hamilton's speech so that when Hamilton came to close there was little for him to say. Thereafter he never insisted on making the closing argument where Burr and he were both on the same side.

These two men were the greatest lawyers in New York—perhaps the greatest in America. Their style was entirely different. Hamilton was more of an office lawyer and not much of a judge of human nature. Hamilton did not prepare his cases exceedingly well. He relied upon his prominence and his name to influence courts and juries. Burr never took any chances. He completely mastered the facts and the law and was ever ready to take advantage of any happening during the trial. Hamilton's friends claimed that he knew the law better than Burr. Burr's friends never conceded this, but claimed that Burr was more successful. Burr was criticised for saying: "Law is whatever is boldly asserted and plausibly maintained." Hamilton in making an argument once said: "Never put off till tomorrow what you can do today." Burr replied: "This is a maxim for sluggards. A better reading of it is, never do today what you can as well do tomorrow, because something may occur to make you regret your premature action." Burr always said: "The art of using men consisted of placing each in the position he was best fitted for."

Burr and Hamilton were each making about ten thousand dollars a year in the practice of law. Not fifty lawyers in America were earning as much money then. Burr made forty thousand dollars out of one case by taking land as a fee, which later increased in value. He charged the highest fees of any lawyer in New York—much more than Hamilton. His practice was a general one. The records of the Supreme Court of the United States do not show that Burr was ever admitted to practice there. Hamilton argued a few cases there when he was secretary of the treasury, but these cases involved questions of taxation and he was used on account of his peculiar knowledge. Neither of them had much practice in the Supreme Court of the United States, but they devoted their entire time to trying cases in the *nisi prius* courts of New York, and frequently appeared before the appellate courts of that state. Burr was employed by a great many lawyers in New York to argue cases for them at Albany. He was very clear in his argument and his briefs were very thorough. He asked no favors and granted none. He was fond of the technicalities of the law, yet no lawyer was more ethical and courteous. He was not a great orator, and always spoke in a conversational tone. His language was clear and concise and his power over juries has seldom been equalled. They understood what he meant and he never talked over their heads. He was very impressive and very serious. Seldom did he ever jest. To him the law was a serious matter and he worried tremendously over his cases. He always believed his client was right and never conceded defeat.

In 1789 he opposed the election of Governor Clinton. A short time after Clinton's election he tendered Burr the position of attorney-general of the State of New York. Burr declined, but after several requests accepted the appointment and served two years. It is said of him that New York never had a better attorney-general. He was the third attorney-general of the state. In 1791 Burr was elected to the Senate of the United States, defeating General Schuyler, Hamilton's father-in-law. In 1792 Governor Clinton appointed him to the bench of the Supreme Court of New York, but he declined, preferring to retain his seat in the Senate. At this time he was not over thirty-five years of age and recognized as one of the most popular men in the United States and perhaps the leader of the American bar. In 1774, shortly after mov-

ing to New York, he was elected a member of the legislature and re-elected the next year. He apparently took no part in the formation of the Constitution and during that time was engaged in building up a law practice, and he was chairman of a committee to revise the laws. Apparently he had no idea of ever entering politics and had he not done so, it is more than likely that he would have remained at the head of the American bar for forty years. Burr and Hamilton supported Judge Yates for governor against Governor Clinton in 1789, and this is the only instance in which they ever acted together in politics. Burr was a pronounced Republication and against the party of Washington and Hamilton. He became the leader of his party in New York, as Hamilton was the leader of the Federalists. Hamilton's father-in-law was elected to succeed Burr at the close of his six years in the Senate. Burr became interested in the election of Mr. Jefferson for president and supported him in 1796, but Mr. Adams was elected. Thomas Jefferson received sixty-eight votes and Aaron Burr thirty for second place. Adams became president and Thomas Jefferson vice-president. In 1800 Aaron Burr carried the State of New York for Jefferson and his party. It was the greatest victory ever recorded in New York and made it possible for Jefferson to become president. Without Burr's work Jefferson would never have been president—at least in 1800. For more than six months Burr made speeches throughout the State of New York for Jefferson's party. Jefferson was apparently very grateful and so informed Mr. Burr and the country. Hamilton did not like either Jefferson or Burr, but liked Jefferson better than Burr.

In 1797 James Monroe and Hamilton became embittered against each other on account of some statements Monroe had made regarding Hamilton's conduct with a Mrs. Reynolds. It seemed as if a duel was inevitable and Monroe named Aaron Burr as his second, but the affair was satisfactorily settled and no duel was fought. Therefore, with the election of 1800 under way, Hamilton was tremendously worried over the possibility of Burr being elected president. In 1799 Colonel Burr fought his first duel with Mr. John Barker Church, a brother-in-law of Hamilton. Neither was hurt and Mr. Church extended an apology which Colonel Burr accepted. In the electoral college and after the 1800 election Jefferson received 73 votes, Colonel Burr 73, Adams 65, Pickney 64 and Jay 1. They tied and this threw the election into the House of Representatives and the country was never so excited. Burr soared into national prominence. The one receiving the highest number of votes would be president and the next highest vice-president. For three months the country did not know who would be president. When the House of Representatives convened, a majority of the states was necessary to an election. If a simple majority of the members would have sufficed, Burr would undoubtedly have been president. On the first ballot eight states voted for Jefferson and six voted for Burr. Two states were equally divided between the two candidates. Twenty-nine ballots were taken without any change and for seven days the country was kept in suspense. Much has been said about Burr trying to be elected president, but a careful search reveals the fact that he did nothing himself and wrote an open letter in favor of Jefferson. Most of the Federalists wanted to vote for Burr, but Hamilton was very much opposed to it and insisted they vote for Jefferson, which they finally did and Jefferson became president of the United States and Aaron Burr vice-president. At this time Burr was one of the most popular men in the United States and one of the most successful. Not a word had ever been said against him except by Hamilton, who had become very much embittered against him.

The prevailing impression that while Burr was a successful lawyer, he was an unreliable one, is not true. He was brilliant, yet his success came only after the hardest kind of work. Hamilton was undoubtedly a great lawyer, but never the equal of Burr. Time prevents the discussion of Burr as an appellate court lawyer, but a reading of his briefs will convince anyone that he was one of the best grounded lawyers in America. Anyone interested may read the following cases in the Supreme Court of New York, which he argued, and it will be found that he was usually successful:

Demar vs. Van Zandt, 2 Johnson's Cases 69; Franklin vs. United Insurance Co., 2 Johnson's Cases 68; Giles vs. Bradley, 2 Johnson's Cases 253; Griswold vs. Haskins, 1 Johnson's Cases 135, 1 Coleman & Caines 80; Jackson vs. Rogers, 1 Johnson's Cases 34; Kettletas vs. North, 1 Coleman & Caines 54; LeGuen vs. Gouverneur & Kemble, 1 Johnson's Cases 437; Lanig vs. United Insurance Co., 2 Johnson's Cases 174; Marston vs. Lawrence, 1 Coleman & Caines Cases 97, 1 Johnson's Cases 397; Seaman vs. Haskins, 1 Johnson's Cases 132.

When Burr was elected vice-president, the United States lost one of its most brilliant lawyers. Had he never been elected to this office his troubles would never have started. He should never have entered politics, but should have remained with the law. The Virginia politicians wanted James Madison, then secretary of state, to succeed Jefferson as president. Burr was naturally looked upon as his rival. Burr offended the president by voting against the repeal of the judiciary bill. He presided as vice-president at the impeachment trial of Judge Chase and was commended for his dignity and fairness, but when Judge Chase was acquitted Jefferson was very much offended. Realizing his opposition in Washington, he concluded to run for governor of New York in order to restore himself throughout the country, but the handicap was too great and he was defeated by about seven thousand votes. Hamilton had opposed him, as always, and after his defeat his attention was called to several letters written by Hamilton, which he thought reflected upon his honor and integrity, and several letters passed between him and Hamilton, which resulted in a challenge. They met at Weehawken July 11, 1804, and Hamilton was killed. Burr was indicted in New York and New Jersey, but never prosecuted. Had Burr never killed Hamilton he would still have been one of the foremost men in America. Duelling was a common custom and indulged in by all. Hamilton had acted as a second in one duel, his eldest son had been killed, and he himself had once challenged General Lee for his remarks concerning General Washington. Burr pre-

sided over the Senate until his term of office expired in March, 1805, and at the expiration of his term he delivered an address to the Senate which has ever remained a classic. It is one of the most brilliant bits of oratory ever delivered in this country. When he concluded the Senate unanimously passed a resolution praising him for his ability and thinking for his impartiality. It then extended a franking privilege to him for life, which up to that time had only be extended to General Washington.

A short time before, the Louisiana purchase had been made and New Orleans was the extreme southwest city. War with Spain had been talked of for several years and Burr conceived the idea of organizing a small force and settling in the New Orleans territory with the ultimate object of taking what is now Texas from Mexico. His days as vice-president were over. He was still a popular man, notwithstanding his duel with Hamilton. That he ever dreamed of attacking the United States, as was later charged, seems impossible. What he wanted was a new country and a new life. He could find that in the southwest and, if later on he desired to conquer Texas, he would be prepared to do so. He was still a patriotic American, but preferred, as most people in the southwest did, that all of the country should belong to the United States. He made a trip down the Ohio and into Kentucky. Everywhere he met with a splendid reception. No secrecy was indulged in, but his expedition was an open one. However, while in Kentucky in 1806 the district attorney for the United States at Frankfort appeared in court and asked that Aaron Burr be compelled to attend court in answer to a charge of being engaged in an enterprise contrary to the laws of the United States and designed to injure a power with which the United States was at peace. No charge was there made of any treason against the United States.

The whole world was surprised and, as Burr was not in Frankfort, he did not learn of the matter until several days after the judge refused to entertain the motion. When he learned of it he voluntarily went to Frankfort and in open court suggested to the judge that the motion of the district attorney prevail and that the matter be presented to a grand jury, and disclaimed any intent of levying war against the United States or any foreign country. He appeared at the bar accompanied by his counsel, Henry Clay, who later became famous throughout America. Clay had just been elected to the United States Senate and he demanded a statement from Burr that he never intended to attack a foreign country with which this country was at peace. Upon being so assured by Mr. Burr, he stated his belief to the Court of his client's innocence. After many delays the matter was presented fully to the grand jury and they returned a written declaration completely exonerating Burr from any design inimical to the peace of this country. A great celebration was staged in Frankfort for Burr, which was attended by all of the people of that country. Burr then proceeded to Nashville and was entertained in the home of General Andrew Jackson, who later became president of the United States and who always believed in Burr and sympathized with him and aided him in all of his attempts to settle in the Southwest.

However, the party in power at Washington was alarmed at the popularity of Burr in this new country and while going down the Mississippi he was arrested, gave bond and the grand jury was summonded to inquired into his activities, but after fully hearing the evidence this jury in the Mississippi territory likewise filed a declaration "that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States or of this territory; or give any just cause of alarm or inquietude to the good people of the same." Again Burr was a hero and again celebrations were staged to honor him. The powers at Washington were not satisfied and later Burr was arrested in Alabama and under the orders of the administration transported miles through the wilderness to Richmond, Virginia, where it was intended again to attempt to indict and prosecute him for some offense to be determined on. He arrived at Richmond, March 26, 1807, and was taken before the Chief Justice of the United States, John Marshall, for examination. In a court room Burr was at his best and he indignantly denied that he had violated the laws of his country. After a hearing for three days the Chief Justice declined to commit him for treason, but held him for a misdemeanor. Burr immediately gave bond and was discharged from custody.

When court convened Burr was surrounded by his friends throughout the southwest, including General Jackson who was rendering him all of the assistance he could. A grand jury was impaneled and Burr's most bitter political opponents were placed thereon. The record of Virginia was stained that day by the selection of a jury organized for the sole purpose of indicting Burr. It was generally understood that he would be indicted and when the grand jury returned "an indictment against Aaron Burr for treason" and "an indictment agaainst Aaron Burr for a misdemeanor," not even the prisoner was surprised. Every influence of the administration was to be exerted against him. Mr. Jefferson had expressed himself many times as desiring the election of James Madison, his secretary of state, as his successor. Burr's friends naturally thought he would be Jefferson's successor. His duel with Hamilton had not in any way affected his popularity, at least not to any great extent, because the Senate of the United States, over which he presided after his duel with Hamilton, had unanimously praised him and appeared very friendly. His duel with Hamilton was simply one of the fortunes of war. The Virginians wanted to keep the presidency and it eventually was called the Virginia dynasty. It is fair, however, to state that Jefferson, acting on advices from General Wilkinson, actually believed Burr intended to attack Spain and conquer Mexico. He never believed that Burr intended to attack an American city.

It has now been proven beyond any question of a doubt that Jefferson was seriously imposed upon by General Wilkinson. Records of Spain have been produced showing that General Wilkinson was a traitor to his country and on the payroll of Spain while a general in the United States army for many years. It is fair to assume that had Mr. Jefferson known that General Wilkinson was a traitor, he would not have taken his word against that of Burr and his friends, and would not have

advised Congress shortly before the Burr trial that Burr's guilt was placed beyond question. Court was then adjourned until the third day of August when the trial started, presided over by John Marshall, Chief Justice of the Supreme Court of the United States, and Cyrus Griffin, Judge of the District Court of Virginia. The counsel on both sides were the most able in America. The prosecuting attorney was George Hay, the son-in-law of James Monroe, and a strong supporter of Jefferson. He was assisted by William Wirt, one of the greatest lawyers in America, and Alexander MacRae, then lieutenant-governor of Virginia. The real leader for the defense was Aaron Burr himself. Not a step was taken without his concurrence. His counsel were Edmund Randolph, formerly attorney-general and secretary of state under Washington; John Wickham, one of the ablest lawyers at the Richmond bar, and Luther Martin, the bulldog of Maryland, who had defended Judge Chase before the Senate of the United States, over which trial Burr had presided.

Beveridge says that this was the greatest trial ever held in America. The grand and petit juries were the most distinguished ever assembled, consisting of a future secretary of war, several senators and three future governors. John Randolph of Roanoke was appointed foreman. Burr was to be tried for treason, that is, levying war against the United States, it being the contention of the government that he intended to attack and capture New Orleans and then proceed against Mexico, ultimately making New Orleans the capital. Burr contended that he was preparing to invade Mexico in case war was declared against Spain, which had been threatened for many months. He denied any treasonable intent against the Government of the United States. This trial was to decide forever whether or not the English doctrine of constructive treason should prevail in America or whether an overt act should be proven and thus direct evidence offered of a treasonable act. It was very difficult to secure a fair and impartial jury. In fact one could not be secured. Burr was compelled to accept many jurors who had expressed violent opinions against him and also several of his most bitter enemies. Andrew Jackson, "a tall, lank, uncouth looking personage," was there and presented Burr as a brave man and patriot who would have led America against the hated Spaniards. For this Jackson was to be punished by the administration and his military advancement delayed. Winfield Scott, who later led the American army into Mexico and to victory, attended the trial and declared that it was the president of the United States who animated the prosecution. John Marshall, perhaps the ablest jurist America has ever known, was to preside and insure Burr a fair and impartial trial, notwithstanding the unfriendly attitude of the people and the jury.

Burr examined the jury that was to try him and made only one challenge, that of a man by the name of Hamilton, who had answered his questions in a flippant manner. United States Senator Giles, the most active critic of Burr on the floor of the Senate, was selected as a juror, but, upon being questioned by Burr, withdrew. After the jury was sworn Burr asked the Chief Justice to instruct the jury that in his trial for treason an overt act must first be proven. This was argued for three days, Burr making the principal argument in his own behalf. The Chief Justice delivered a written opinion holding with Burr and the trial proceeded. Burr thereupon applied for a subpoena duces tecum against the president of the United States, Thomas Jefferson, requiring his personal attendance at the trial and that he bring with him certain records and letters written by General Wilkinson, which were desired as evidence. This application was bitterly contested and was argued for several days. At the end of that time the Chief Justice handed down another written opinion holding that the president could be compelled to attend and bring such records with him, and directed that it be done. This ruling caused great consternation at Washington and the president flatly refused to obey it and the matter there rested.

The evidence wholly failed to prove an overt act of levying war, although the Chief Justice was exceedingly liberal with the government and allowed it to offer all of the testimony it had, a great deal of which was purely hearsay. Burr took the leading part in his own defense and never appeared at greater advantage as a lawyer—cool, calm, dignified, earnest and forceful, meeting every argument with cool logic, and never displaying any feeling or criticising the administration or the prosecution. It was a great legal battle, perhaps the greatest this country has ever seen or will ever see again. The prosecution was bitter and relentless. Friends of the administration had gathered from all over the country and remained throughout the trial, stirring up and inciting the populace against Burr. Many of his friends were also in attendance, attempting to offset the strong arguments used by his enemies. Marshall presided with the greatest of dignity and could not be swayed either for or against the defendant. He undoubtedly knew that he was making history and that his rulings would be followed throughout the life of this republic. Every opinion which he gave was in writing and very carefully prepared. It was a new question in America. Under the law of England treasonable intent was sufficient to convict without any evidence of an overt act. The Colonies had rebelled against England for this and other reasons and America was on trial. While Marshall and Jefferson were not friends, yet Marshall was fair to the administration. Neither had Marshall ever liked Burr. Perhaps he was the only impartial judge at that time in America. He was not there to persecute, neither was he there to belittle the administration. This trial was to make him the greatest judge that ever sat in America. He was unconcerned throughout, kind and considerate with both sides; never arbitrary, but allowed the greatest latitude to both the government and the defense. It was to be the monument left by this great lawyer to the world, and yet apparently he did not realize what a great trial he was presiding over. To him it was a lawsuit and his duty was to preside fairly and impartially. The fact that the administration initiated and prosecuted the defendant or that the defendant had once been vice-president of the United States was of no concern to him. His duty was clear and he followed it. The bench and bar of America will profit much by reading of this trial and the marvelous way in which Marshall presided.

(To be concluded in the November issue)

JUDAH P. BENJAMIN: DISTINGUISHED AT BARS OF TWO NATIONS*

By James H. Winston
Member of the Chicago Bar

On the 29th of September, 1865, in a letter to his sister, Mr. Benjamin writes that in Paris some bankers had offered to obtain for him an honorable and lucrative position in financial circles, but he adds "that is far less tempting" than his old profession, and he repeats that "nothing is more independent nor offers a more promising future than admission as a barrister to the Bar of London." He thinks it better that Sis and Hattie should return to New Orleans, where, with their industry and economy, the expenses would be small, and that he would be able to help them to some extent, "say about $75.00 a month."

In London he was called on by Lord Campbell and Sir James Ferguson, the former a Peer and the latter of the House of Commons, both accidentally in London, for the "whole world" as they say is now in the country, this being the long vacation in London. Both assured him that he would meet the utmost aid and sympathy and that he would be called on by a large number of the leading public men as soon as they returned to town. Mr. Disraeli sent word expressing the desire of being useful when he should arrive in town, and he reports that he "has been promised a dinner" at which he was to be introduced to Gladstone and Tennyson. From the foreging it is clear that he was not an unknown stranger in a foreign land.

In response to the offer of pecuniary assistance from his ever loval friends, the Bayards, he wrote on October 20, 1865:

"I cannot describe to you, my dear friend, how deeply I am touched by the kind and generous offer of yourself and son, and if I needed aid, there is no one from whom I could consent to receive pecuniary assistance sooner than yourselves. Fortunately this is not the case."

He explains that he had been lucky enough to receive a hundred bales of cotton that had escaped Yankee vigilance: that the price there was so high that it had given him nearly twenty thousand dollars, besides which "he had made already almost ten thousand dollars by means of information furnished by a kind friend in relation to the affairs of a financial institution, in which he invested his little fortune." And he cheerfully added: "So you see I am not quite a beggar."

But the promising investment turned out to be "another disaster." The institution in question was the banking firm of Overend, Gurney & Company, which went into bankruptcy, and all that Mr. Benjamin possessed on earth was swept away.

In an earlier letter he had written to his sisters that in order to join one of the Inns of Court it would be necessary for him to become naturalized, to eat dinners for twelve terms (three years) and that these obstacles might force him to abandon his desire of becoming a British lawyer. However, through the kindly offices of generous friends at the Bar, and due to the lucky circumstance of having been born in a British possession and of British parents, the requirements were dispensed with, and on the 13th day of January, 1866, he joined Lincoln's Inn, where he would sit down to dinner with students fresh from Oxford, and although old enough to be their father, he was cordially received and completely at home. In after years Lord James said, from the moment of his arrival he was "one of us."

Mr. Benjamin applied to Charles Pollock, later Baron Pollock, to come into his office as a pupil. Mr. Pollock's business being mostly in court, he limited the number of his pupils to two, and declined to receive Mr. Benjamin. On February 3, 1866, Pollock's father, Sir Frederick, then Lord Chief Baron of the Court of Exchequer, brought down Mr. Mason, the late envoy from the Confederate States, and Mr. Benjamin, to sleep for a couple of nights and to meet a few county neighbors. Miss Pollock gives an interesting description of her first meeting Mr. Benjamin on this occassion. She says she had pictured him as "an American of the conspirator type," and that to her surprise, when he entered the room she saw "a short, stout, genial man of decidedly Jewish descent, with bright dark eyes and all the politeness and *bonhommie* of a Frenchman, looking as if he had never had a care in his life."

Mr. Charles Pollock reports that the next day after this visit, his father, seeing him in Court, sent down a note saying "Have you done wisely in declining to take Benjamin as your pupil?" Upon the son's replying that he didn't have time to bother with teaching another pupil, the Chief Baron sent down another note, saying:

"Benjamin has no need to learn law. All he needs is to see something of the practice of our courts and to obtain some introduction to the English Bar."

Sir Charles was in time to revoke his first decision, and within a week Mr. Benjamin was in his Chambers. Sir Charles relates that on Benjamin's first day in his office he handed him a request from Scotland Yard for an opinion on the right to search persons in custody before they had been convicted of crime, as, for instance, to find dangerous weapons, stolen property and so forth, and jokingly said to Mr. Benjamin: "Here is a case made for you, on the right of search," alluding to the well-known international dispute arising from the stopping of the Trent and the removal of Mason and Slidell. Sir Charles reports that upon his return from court that evening Mr. Benjamin produced a completed opinion in neat handwriting, which was in such clear and simple language that it served for many years as the guide of Scotland Yard.

On February 21, 1866, he wrote to Bradford, his former partner, that he had arranged to be called to the Bar upon keeping four terms (one year); that he was employing himself in close study (in the interim making as much interest as he could manage with the Benchers of the Inn); that he was making enough to pay for his personal expenses by contributing one leading article a week to a daily paper, for

*Continued from September issue.

which he was paid five pounds; that he thought he had enough with close economy to get through three years, and by that time he hoped to be able to secure a decent practice. Knowing that Bradford would be interested in the regulations and forms attending his admission to the Inn, he says he will "incur the extra postage and send him the regulations." He had to pay fees totaling thirty-seven pounds one shilling, and also to deposit one hundred pounds as security that he would pay for his dinners. He says:

"You would be amused to see our dinners at Lincoln's Inn. There are tables at the end of the room for the Benchers, who are the old leaders of the Bar such as Lord Brougham, Lord St. Leonards, Sir Roundell Palmer, Sir Hugh Cairnes and so forth; next come tables for the barristers, of whom some forty or fifty always are at dinner; next come the students to the number of about one hundred and fifty, including your humble servant, all seated at long tables and dressed in stuff gowns which the waiters throw over them in the antechamber before entering the dining hall."

He says that "no one at mess helps another, but the etiquette is each in turn helps himself, one being first for soup, the next first for the joint, and so on."

In June, 1866, through the continued generous intervention of British lawyers in high place, the rules were further relaxed and Mr. Benjamin was called to the Bar by the Benchers of the Inner Temple. He took chambers in Lamb Buildings, where he remained during the whole period of his practice at the English Bar.

An incident which is frequently mentioned in British reminiscences of Mr. Benjamin is a performance which illustrates his efficiency and untiring energy. An old established Ship Insurance Club desired to have its rules remodeled and ready for the annual meeting which was to occur within two days. The regular lawyers of the Club declined the undertaking for the reason that there was not sufficient time to do the job. The papers were handed to Mr. Benjamin late one evening, who, instead of examining and collating like rules of other Clubs, sat down early in the morning, and, never pausing for a mid-day meal, produced by evening the completed rules written out in his own neat hand, *currente calamo*, with scarce an alteration or correction from beginning to end. Baron Pollock states:

"I doubt if any draftsman within the walls of the two Temples could have done this so efficiently within the same time."

Even in these lean days at the Bar "he held his head high in the face of poverty," and did not stoop under the pressure of necessity to accept work for inadequate compensation. On one occasion a solicitor's messenger brought papers to him for an opinion, with a fee of five pounds marked on them. Mr. Benjamin left the file on his desk without touching it. A few days later the messenger called for the papers. Finding no opinion among them he returned and asked if there had been some mistake. Mr. Benjamin replied that there was no mistake; that the five pounds was for taking the papers in—not reading them. Shortly thereafter the solicitor appeared with an additional fee of twenty-five pounds and the opinion was forthcoming without delay. At a later date, the solicitor told Mr. Benjamin that the client had specifically requested Mr. Benjamin's opinion, and he smilingly said if he had known *that* the fee would have been twice as much.

Meanwhile this is what he was writing to Penny:

"Tell Sis and Hattie to write me and let me know how money matters are getting on and not to hesitate to write me if they are the least in want, as I can always find a few hundred dollars without pinching myself, and I have no fears of my ability to make a handsome competence at the Bar here."

Mrs. Bradford, who was much in London during these early months of his struggle, reports that he lived as simply as he could in bachelor quarters, dining furtively, sometimes on bread and cheese, at cheap restaurants, where it would hardly do for him to be seen, if he hoped to maintain the dignity expected of a barrister, and cultivating the habit of walking, since the penny bus was beneath a barrister's rank, while cabs were above his means.

In a letter to Mrs. Kruttschnitt dated April 11, 1867, almost a year after his admission to the Bar, he says that he has so little to do compared with his former professional life that he is turning author, and has in preparation a law work which will be ready for publication he hopes in November or December next.

During the first six months he dined with his political idol, Gladstone, but he resolutely declined social attentions, writing home that he had no time to yield to pleasures until he had secured some lucrative business. He never abandons the hope of paying a visit to New Orleans, and looks forward to the day when "restored peace to our unhappy South will enable me to devote a long vacation to a full month's visit to you all."

There was the usual delay in the publication of the magnum opus. In the spring of 1868 he writes home:

"My book is nearly finished, but the nearer I get to the end the more fastidious I become about correcting, amending and improving it. I do not think it will be out before June; but who told you that it had a jawbreaking name? It is a simple treatise on Sale under the English law, which is very different from the law of Louisiana, and the subject is quite a difficult and troublesome branch of professional learning here."

When *Benjamin on Sale* came out, it was a much needed work, a reasoned and orderly presentment of the law; a master's discussion of principles, not a mere crude collection of decisions. It met with immediate and popular demand by lawyers, not only in England but in America as well where prejudice against the author, both North and South, was no impediment to their making use of so valuable a legal work. Soon after its publication, Baron Martin, when taking his seat one morning upon the Bench, asked to have Mr. Benjamin's work handed to him.

"Never heard of it, My Lord," was the answer of the chief clerk.

"Never heard of it!" ejaculated Sir Samuel Martin, "mind that I never take my seat here again without that book by my side."

As late as February 8, 1870, the struggle was slow, and in a long letter to Penny he encloses rare stamps saved by his daughter, Ninette, for her cousin, Julius. He hopes that Sis would soon be consoled for her rheumatism by a little grandson, and he says: "I long beyond measure to see you all once more, but I am plainly to be disappointed this year. The simple truth is that I cannot afford the visit." He says competition is very keen; that attorneys give their briefs where they can, to barristers who are related by blood or marriage. He says that his book has done him an immensity of good and that if he had not written it he should be nowhere in the race. He hopefully adds: "I think from the present aspect of things that I shall nearly succeed in not getting behindhand this year."

His letter of August 10, 1872, gives the most

cheering news he has yet sent home. Upon the recommendation of a number of the judges the Lord Chancellor had made him a Queen's Counsel. He comically describes to his family how he will now have to wear a full-bottomed wig, the wings falling down on his shoulders, knee breeches and black silk stockings, shoes with buckles, and in his silk gown to present himself at the next Levee of her Majesty, to return thanks for her gracious kindness. Fortunately, he says, there are yet three months for him to brace up his nerves to the trial of making himself such an object, and he promises to send a photograph, to enable them to laugh at "how like a monkey brother looks in that hideous wig." He cautions his sister that what he writes is exclusively for the family circle, and not to let any details other than the *fact* of his promotion get into the newspapers, as it would be extremely mortifying if it should appear that he was puffing himself—"than which," he says, "nothing is deservedly regarded with more contempt."

In 1874 he reports the marriage of his daughter to Captain DeBousignac, and he says:

"By giving up all my savings I have been able to settle on Ninette $3,000 a year, so that her future is now secure against want, and I must now begin to lay up a provision for the old age of my wife and self."

Think of the courage of a man at the age of sixty-three giving up all of his accumulated savings to provide a dot for his daughter.

In March, 1875, he writes:

"I have just finished the trial of a cause which lasted eight days, and on Sunday I was at my desk from breakfast until two hours past midnight, with only an interval of half an hour for taking some light food, as one cannot dine when so deeply absorbed."

And he had often confessed, back in New Orleans days, that "he loved to bask in the sun like a lizard."

It was at this period that business began to come to him fast and furious. He was now the vogue, being in great demand by solicitors and often specified by the actual client.

Later in the year, 1875, he writes his sister, Hattie:

"I am scarcely able to get to dinner before nine or ten o'clock at night, and generally my whole Sunday is also occupied."

He was so much in demand that he could name his own price, and when questioned as to how he managed to bring in such a large income, he jokingly said:

"First I charge a retainer; then I charge a reminder; next I charge a refresher; and then I charge a finisher."

Sir Frank Lockwood tells an amusing experience which he had with a country relative who was bent on having a consultation with the great American barrister. After traveling two hundred miles to London, he thought he ought to let Mr. Benjamin become acquainted with the complications of the family tree, and so for twenty minutes the simple countryman went on with his geneological table, Mr. Benjamin giving him his pleasant and undivided attention. Then a clerk opened the door and said: "Next consultation, Sir," and the countryman, who had not had a word from the adviser, found himself shaking hands and highly delighted with his reception.

"What a fine fellow to be sure; and how he listened to me."

"But you didn't get any opinion from him," observed Lockwood.

"No, I had forgotten that."

In 1879 he described to Mrs. Kruttschnitt the house which he is building for his wife at Paris, and concludes: "We shall be housed like princes, but the cost will be greater than I supposed, and including the additional furniture I don't get off for less than $80,000. However, all is now paid for."

With a view to limiting his practice, he now refused to go into any other court than the House of Lords or the Privy Council, except for a fee of 100 guineas, and his fee for a consultation at a client's home was 300 guineas.

Most of the English articles on Mr. Benjamin, of which there are many, refer to his celebrated encounter with Lord Chancellor Selborne in the House of Lords. Mr. Benjamin had insisted on proceeding with his argument as he had planned it. Whereupon Lord Selborne remarked in an undertone, "Nonsense!" Mr. Benjamin quietly tied up his papers, bowed gravely to the members on the Bench, said "That is my case, my Lords;" turned and left the House. Upon the convening of court next day Lord Selborne noticed the absence of Mr. Benjamin and stated in open court that he certainly was not justified in applying the term "Nonsense" to anything that fell from Mr. Benjamin, and requested the Junior in the case to convey his regrets that he should have used such an expression. Mr. Benjamin promptly wrote a friendly and cordial note of acknowledgment. The incident is said to have greatly increased respect for him.

Some idea of Mr. Benjamin's activity at the British Bar can be had from the fact that in the cases reported in 7 Appeal Cases for 1881-1882, he appears in nineteen, and in Volume 6 for 1880-1881, he appears in eighteen.

To a lawyer of mediocre ability the change from the practice under the French Code of Louisiana to the Common Law of England would have been an insurmountable difficulty. To Mr. Benjamin it was an easy task, and his knowledge and experience of both systems gave him an enormous advantage in Privy Council Appeals. It brought him many briefs from the Colonies and Scotland—concerning matters with which English lawyers were unfamiliar. To take one year of the Session Reports, containing Scotch Appeals, Benjamin appeared in eight out of fifteen cases.

His Fee Book shows that in the first year of his practice his income amounted to less than 500 pounds, but it showed a gradual increase for every year thereafter. For each of the years from 1877 to 1882 his fees were in excess of 15,000 pounds, his total earnings in the sixteen years of his practice at the British Bar being something more than $700,000.

It can well be imagined the kind of impression that a man of his versatility would produce upon the solicitors of London. A solicitor once handed him a document in Spanish, requesting an opinion and promising a translation next day.

"It is unnecessary," said Benjamin, "I read Spanish."

The solicitor replied: "Oh, Mr. Benjamin, what don't you know!"

That his reputation was not merely of the post-mortem variety can be gathered from contemporaneous accounts of him. For example, the American Law Record, published in Cincinnati, said in 1880 that fourteen years after his escape this fugitive had become the recognized leader of an institution of all others the most exclusive and difficult in which to attain prominence and success. It continues:

"The briefs declined by him would double his income. We doubt if this has ever been equalled by any other aspirant for distinction at the English or American Bar."

Mr. Benjamin's name has often been linked with that of Disraeli, whose Premiership occurred during the same period. But any likeness between them is wholly superficial, remembering that Disraeli was a fastidious dandy whose purple waistcoats used to startle the House of Lords, while Benjamin, though scrupulously neat in dress, chose simple black as his preference. He even disliked wearing an evening coat, because "it usually went with a function." In politics he was for Gladstone, and opposed to Disraeli.

After he attained success his life in London was the simple existence of a bachelor in chambers. He would dine at the Junior Athenaeum, stroll with a cigar in his mouth into the billiard-room or the card-room, to watch "the boys," as he called his juniors, play. Sometimes he would engage in a game himself, as he was a skilful player at most games. Unless very hard pressed, he never worked after dinner; he would postpone his dinner till nine if he could by so doing get through his tasks before the time for digestion came. If that was impossible he dined at seven or eight, resumed work at ten, and sat up till two. He rose at eight, finding it impossible, as he confessed, to get up, as some lawyers did, at five to go through his briefs. His portrait now hangs on the wall of the Junior Athenaeum, a distinguished Club of which he was a member.

There is no evidence of sparkling wit, but his playful humor is exhibited in a characteristic letter written in 1881 to Mrs. Bayard:

"My dear Mrs. Bayard:

"It seems that Mrs. Benjamin took it into her head today to have made for you a cake of the kind she thought you liked, and I found her determined when I came home, that *I* should write you a line in *her* place, as she was unwilling to *ventilate* her English in writing. I obey like a good husband—so much for *her*. For myself, I beg to place my self on the very top of the list of your warmest friends, and at the feet of your charming daughters. Please don't let Bayard have any of the cake."

In a letter to Mr. Bayard, "answering your welcome and affectionate letter," he reports that in May, 1880, while on a visit in Paris, he was thrown to the ground with a great violence in a foolish attempt to jump off a tram car in rapid motion. He says, but for his hat, which remained on his head and acted as a buffer, he must have been killed. However, he sufficiently recovered from this accident to continue actively his practice until early in the year 1883. But on the 12th of February, he writes to Penny from 41 Avenue d'Jena:

"You will see by the above heading that I am still here, and this will be my address for the future, for I have left the Bar and shall practice no more."

Having been advised by the doctors of a diabetic affection, he directed his clerk to announce his retirement, to return all briefs to clients, and to repay all fees in matters which he was unable to finish. And, though strongly urged, he declined a fee of 2,000 guineas, offered for an argument in one case.

He pathetically states his surprise and how deeply moved he was at the announcement from every leading London newspaper, with the Times at the head, that his retirement was a matter of national concern and regret. He confesses that "he can hardly keep his eyes free from tears on reading testimonials to the rectitude and honor of his professional conduct."

The papers refer to his life as being as varied as an Eastern tale. The London Daily News says that the source of his reputation lies in the Carlylian phrase "Under a man's own hat," and concludes that there were not many hats which had covered a will so indomitable and an intellect so powerful. Another paper says that Benjamin's race has shown itself alive to the truth of the principle that "It's dogged as does it"; that the members of the race are not as a rule devoid of wits, and concludes that Mr. Benjamin had a disproportionate share of both doggedness *and* wits.

The Daily News concluded its article:

"The career of such a man is, say we, almost unexampled. Mr. Benjamin no doubt had friends in England who may have smoothed the way of some technical difficulties and hastened some honorary distinctions, but the reputation he has attained is not of the kind that friends can hasten or enemies can mar."

The London Times regrets that fear of offending the United States prevented the elevation to the Bench of an Ex-Confederate, and says that "none could have been selected worthier than Mr. Benjamin of a distinction which usually crowns a practice like his. By universal conviction only one or two of his rivals a dozen years ago matched his claims for exalted judicial rank."

Upon the announcement of his retirement the Law Times said:

"With the exception of Lord Justice Mellish, we think it may be said that no lawyers of the present generation can be put in the same category with Mr. Benjamin. That no man at the Bar can occupy the space occupied by him is absolutely certain."

On February 28, 1883, he received the following letter from the Attorney General of England:

"My Dear Benjamin: I have before me a document signed by almost every leading member of the English Bar, the contents of which I am requested to convey to you. These old friends of yours are anxious that you should afford them, collectively, an opportunity of showing their friendships toward you, and they trust you will consent to be their guest on some occasion convenient to yourself. I hope you will understand our reasons for desiring thus to meet you. We do not forget how you came some seventeen years ago a stranger amongst us. We offered you then no insincere welcome, and in return you have always, during those years of your sojourn with us, supported the honor and position of our profession, and have added much to the public estimation in which we are held. And so now when you leave us, your old associates are anxious to show and to tell you how much they value the friendship they know that even now they have not lost. I am, my dear Benjamin, yours most truly, Henry James."

The great banquet took place in the hall of the Inner Temple on Saturday evening, June 30th. Sir Henry James, attorney general, was in the chair. Lord Selborne, the Lord Chancellor, on his left, and Mr. Benjamin on his right. There were present all that England ranked highest in the legal profession, including Lord Coleridge, who had wanted Mr. Benjamin elevated to the Bench, the Justices of all the high courts, and more than 200 members of the Bar. After the usual toast to the Queen, the attorney general, in proposing the health of Mr. Benjamin said:

"Tonight the Bench and Bar unite to bid farewell and to wish Godspeed to an old and valued comrade. Remarkable and unprecedented as this gathering is, still the causes which have occasioned it are easy to tell."

He then referred to the fact that after the great Civil War "little save honor, reputation and great gifts remained to him," and says that his success was clearly based on merit, "for who is the man save this one of whom it can be said that he held conspicuous leadership at the Bars of two countries;" and continued, "the honor of the English Bar was as much cherished and represented by him as by any man who ever adorned it, and we all feel that if our profession has afforded him hospitality, he has repaid it—amply repaid it—not only by the reputation which his learning

has brought to us, but by that which is more important, the honor his conduct has gained for us."

Lord Coleridge, after referring to the fact that an older friend had told him that forty years before a similar honor had been intended for Story, said:

"Forty years have elapsed and we pay such an honor to one more distinguished than Story, but whom we think of here as an English barrister and an Englishman."

With modest simplicity, Mr. Benjamin thanked them for their kindness and said farewell to the Bar.

On Tuesday, May 6, 1884, the great kindly gentleman died at his house in Paris, and lies buried in the Cemetery at Père LaChaise.

By his will, written entirely in his own handwriting, he devised legacies amounting to 18,000 pounds to his three sisters and brother, Joseph; his Paris home and the remainder of his personal estate, consisting of various securities appraised by his executors at 60,000 pounds, he left to his wife and daughter.

His executors were two old friends, London barristers. One of them recalls that one of the first things he remembers Mr. Benjamin saying was that his old partner in New Orleans advised him never to keep "any letter or other document if you can possibly help it. Preserve correspondence as long as it is useful, but never keep it a moment longer than is absolutely necessary." Accordingly, when he died he did not leave behind him half a dozen pieces of paper.

Gamaliel Bradford, the psychographer, who professes to read the human soul, makes much of Mr. Benjamin's destruction of his records, and, not scrupling to be clever at the risk of destroying a man's rightful place in history, says that in so doing Mr. Benjamin, like the ostrich, left the least intelligent part of him exposed to public view. In concluding Benjamin's sketch in "Confederate Portraits," he says:

"In short, he was an average, honorable, and, in politics, rather ineffectual, gentleman. Perhaps he would have preferred a different verdict. If so, he should not have destroyed those papers."

But notwithstanding his custom of destroying old papers, Mr. Benjamin's accomplishments remain as facts, a record that is not likely to have a parallel, for many men may have achieved either of his two successful careers, but few men would have been able to found the second on the ruins of the first.

JUDICIAL COMMENT ON THE EVIDENCE IN JURY TRIALS

By Henry L. Walker
Member of the Bar of the District of Columbia

At common law it is permissible for the trial judge to express his opinion on the weight of the evidence and the credibility of witnesses, providing, of course, he leaves the ultimate determination of the facts to the jury. This practice has long been regarded as a valuable feature of the jury system.[1] While carefully preserving the traditional functions of court and jury, leaving the latter as sole triers of the facts, it has the inestimable advantage of affording the jury the assistance of an analytical and dispassionate review of the evidence. The value of advice from the bench is well expressed by Professor Dicey, who says:

"Trial by jury is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of twelve men of not more than average intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of, popular confidence in the judicial bench. A judge is the colleague and readily accepted guide of the jurors."[2]

Indeed, when the system of trial by jury is considered analytically, it seems hard to find any tenable objection to the rule permitting such comment. The judge is trained in the conduct of judicial disputes, and his primary function is to enunciate and apply the rules of law pertinent to the particular cause. The jury, on the other hand, are a body of untrained average citizens, to whom is delegated the duty of weighing the disputed evidence and determining the truth of the matters in issue. We conceive that every litigant is entitled to have the ultimate truth of his claims determined by a group of ordinary fellow-citizens, and we are unwilling to entrust the final determination thereof to the (supposedly) cold and isolated intelligence of a presiding magistrate. This system, whatever criticism may be made of its practical operation in the present day (and objections to it are many) at least may be said to have much justification in abstract theory; moreover, it is deeply rooted in Anglo-Saxon distrust of magisterial authority. But, conceding the efficacy and desirability of such a mode of adjudication, it is yet undeniable that the ends of justice are served by intelligent observations from the presiding judge on the various features of the evidence. His daily work consists of observing the course of litigation; he has naturally become discriminating in evaluating witnesses and testimony; his faculties are trained in sorting and coordinating complicated facts. How can justice be retarded by permitting him to place this training and experience at the service of the jurymen?

Despite these obvious considerations, however, there has grown up in America a tendency to restrict the judge in this respect, and to make of him a mere referee, removing him as a positive force for justice in the conduct of the proceedings. Thus, in many states, the judge is forbidden by statute or constitutional provision to indicate in any way his opinon on the facts or the credibility of the witnesses. It is now sought to extend this rule to the federal courts, and a bill for that purpose[3] passed the Senate March 19, 1928.

1. See, for example, remarks of William Wirt, *arguendo*, in McLanahan v. Universal Insurance Co., 1 Peters, 170, 181 (1928).
2. Dicey, Law of the Constitution (8th Ed.), pp. 389-390.
3. Senate Bill No. 1094, 70th Congress.

This bill, which would work a profound change in the federal procedure, has received scant consideration, although it concerns a matter of gravest import in legal administration. How does it happen that at a time when agitation is so great for reform and simplification of the law, in the interest of surer and swifter justice, a measure is adopted by the Senate which makes for delay, expense and uncertainty? What reasons were advanced to justify a measure which constitutes such a retrogressive step?

A report from the Senate Committee on the Judiciary, submitted by Mr. Caraway of Arkansas, the author of the bill, accompanied this measure when it was presented to the Senate. The report says that the bill will

"prevent trial judges in United States courts from invading the province of the jury by expressing personal opinions as to the weight of the testimony or the credibility of witnesses.

"In summing up the trial judge frequently so intermingles his personal opinion as to the weight and the effect of the evidence offered and the credibility of the witnesses with his declarations of law that the jury and sometimes even counsel in the case are unable to distinguish between the declarations of law and the personal opinions of the trial judge as to the merits of the controversy.

"This abuse in some jurisdictions has become so flagrant as to practically destroy the integrity of trial by jury. It not infrequently happens that the trial judge goes to the extent of denouncing in the presence of the jury, witnesses who may appear in the case and of expressing his opinion that their testimony is false and that the witnesses are guilty of intentional false swearing.

"If the trial judge shall say anywhere during his 'summing up' that the jury is at liberty to believe the evidence as given by the witnesses, the injured party is without remedy. If, as the court has said, the expression of the opinion by the trial judge does not influence the jury in arriving at its verdict, it certainly serves no purpose at all. Therefore the record should not be encumbered by the expression of his personal opinion. On the other hand, if it does so influence the jury, and all lawyers know that it does, it is a clear invasion of the province of the jury, and therefore a flagrant usurpation of the prerogative of the jury to weigh the evidence, and should be corrected."

The foregoing somewhat hyperbolic argument yields two concrete objections to the present federal practice in the matter of judicial comment, and these will be briefly adverted to:

1. Judicial comment on the evidence and the credibility of the witnesses constitutes "a clear invasion of the province of the jury and, therefore, flagrant usurpation of the prerogative of the jury to weigh the evidence."

Now, this is a sheer historical and legal inaccuracy. At common law it was always permissible for the judge to make such comments, and this privilege was freely exercised.[4] American courts naturally adopted this common law procedural rule, and it has been recognized in the federal courts from an early day.[5] So, too, it was adopted in our State courts, and still prevails in those where it has not been abolished by statute or constitution. In short, the province of the jury is to decide the facts, *with the assistance of judicial advice*, and to say that such advice is "an invasion of the province of the jury" is to ignore the true boundaries of that province.

2. Judicial comment on the evidence improperly influences the jury, the jurymen being inclined meekly and blindly to accept the views indicated by the judge.

This view is not borne out by practical observation. Indeed, if it be true, then it impeaches the validity of the whole jury system, and constitutes an argument in favor of restricting, rather than enlarging, the influence and power of the jury. Chief Justice Taney said, in discussing the rule permitting judicial comment:

"Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact."[6]

So, too, Mr. Justice Holmes has succinctly answered this objection to the present federal practice. He said:

"Universal distrust creates universal incompetence. In the courts of the United States the judge and jury are assumed to be competent to play the parts that have always belonged to them in the country in which the modern jury trial had its birth."[7]

That in actual practice juries are not bullied and dominated by remarks from the bench is a matter of common observation in the courts. A distinguished member of the New York Bar points this out in a recent work, wherein he says:

"The effort to lessen the power of the trial judge is predicated chiefly on the theory that if he discloses an opinion as to the facts the jury will meekly adopt his conclusions; but if it be assumed that the conclusions of a jury as to the evidence and the witnesses cannot withstand the expression by a judge of a contrary view, it merely argues that a jury is a very irresolute body—a conclusion refuted by long experience. Juries have intelligence enough to know whether their domain as judges of the facts is being invaded and to resent dictation by a judge, which experienced trial lawyers know is frequently dangerous to the side he favors."[8]

The jury constantly receives advice through the trial, for that is the true nature of the arguments of counsel. Why, then, should not they receive from the bench advice which is wholly unprejudiced, and which is no more binding on them than the views of counsel? Dean Pound answers this question by ascribing restrictions such as that proposed by the Caraway Bill, to frontier modes of thought. He says:

"In particular it may be shown that legislation restricting the charge of the court has grown out of the desire of eloquent counsel, of a type so dear to the pioneer community, to deprive not merely the trial judge but the law of all influence upon trials and to leave everything to be disposed of on the arguments."[9]

Having examined the somewhat insubstantial objections advanced to the present federal practice, let us consider the affirmative advantages of that practice, and corresponding disadvantages of legislation restricting the charge to the jury.

1. Judicial comment on the evidence renders valuable assistance to the jury, and makes for just verdicts.

All students of procedural reform recognize the immense advantage of a dispassionate summing up by the trial judge. Complicated and conflicting evidence has been received. Witnesses have contradicted one another (and often themselves). Experts have battled. Counsel have presented the

4. Solarte v. Melville, 7 B. & C. 430; 108 Eng. Reprint 784. Davidson v. Stanley, 2 M. & G. 721.

5. Carver v. Jackson, 4 Peters 1, 80 (1830). Magniac v. Thompson, 7 Peters 348, 389 (1833).

6. Mitchell v. Harmony, 13 Howard 115 (1851).

7. Graham v. United States, 231 U. S. 474, 480 (1913).

8. Henry W. Taft, Law Reform, p. 25.

9. Roscoe Pound, Spirit of the Common Law, p. 124.

partisan interpretation of the facts. It is easy to see that in this situation a well-reasoned summing up by the Judge, co-ordinating the facts, pointing out inconsistencies and contradictions, warning the jury as to the probative value of various kinds of testimony, and marshaling the issues before them, is bound to be of vast assistance to the body charged with finding the facts. A recognized authority on procedural law has said:

"A few weeks spent in watching jury cases tried in England will convince one that the summing up does more to secure a verdict on the merits than all the rules of evidence which legal ingenuity has devised. . . . Naturally his presentation (the judge's) will have weight with the jury, as it ought to have, for there can hardly be any doubt about the immense value of a non-partisan summary after counsel have urged their antithetical views upon the jury."[10]

The complicated litigation which composes such a large part of the business of the federal courts, demands more active participation by the trial judges, rather than less; and a proposal to muzzle them is a distinct backward step. Indeed, the tendency of legal thought is away from, rather than toward, such restrictions. Thus, the 1927 annual report of the Massachusetts Judicial Council[11] urged the repeal of the restrictive statute in that state, and a return to the common law and federal practice in the matter of judicial comment. The report said that "the jury should have all the assistance in arriving at a just verdict which may be given them by the only trained and impartial mind participating in the trial."

10. Professor Edson R. Sunderland, in an address delivered before the American Bar Association at Detroit, September 3, 1925; reprinted in 24 Michigan Law Review 109.

11. A body created by statute in 1924 "for the continuous study of the judicial system."

2. The proposed legislation would increase the number of delays, appeals, reversals and new trials.

One has but to look at the digests to see the vast number of cases reversed because of some comment on the evidence by the trial judge, in those states where such comment is prohibited. Nor need there be an unequivocal expression of opinion from the bench to constitute reversible error. The slightest remark which might be construed as in some manner expressing an opinion on the facts will result in a reversal.[12] The result of this is not simply to deprive the jury of the expert advice of the magistrate. The further inevitable result is to make it necessary for the judge to have constantly in mind the danger of making a "reversible remark." His rulings on the evidence and his charge on the law must be couched in such guarded and general language as often to be nearly unintelligible. His whole freedom of action is circumscribed, and he is deprived of that full control of the proceedings which should inhere in the judicial office.

At a time when public demand is so strong for more prompt and efficient justice, it is to be profoundly hoped that the federal courts will not be hobbled with restrictive legislation, and that the judges will not be relegated to the role of mere umpires. Rather, they should be left unfettered to represent an affirmative social control over the course of litigation, and to fairly and intelligently assist their juries in doing justice between the parties.

12. For examples of this, see Williams v. Dickenson, 9 Sou. Rep. 847 (Fla.); Smith v. Meyers, 71 N. W. Rep. 1006 (Neb.); and Shaw v. People, 81 Ill. 150.

LETTERS OF INTEREST TO THE PROFESSION

Uniform Legislation in Wyoming

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I notice in the last issue of the Journal you state that a letter from Hon. C. R. Hollingsworth of Ogden, Utah, states that at the recent Session of the Utah Legislature six uniform acts were passed.

Possibly you may also be interested to know just what Wyoming did at its last Session which adjourned Feb. 16, 1929. The writer is a member of the Wyoming State Senate, and is keenly interested in uniform legislation.

Among the various acts recently passed were the following: Uniform Federal Tax Lien Registration Act; Uniform Fiduciaries Act; Uniform Fraudulent Conveyance Act; Uniform Illegitimacy Act; Uniform Veterans' Guardianship Act.

Wyoming is thus only one in number behind Utah. It is our intention to get all of the uniform acts passed here as soon as possible.

I am a member of the A. B. A. and read the JOURNAL each month. I greatly enjoyed the article on J. P. Benjamin. I was reared near New Orleans and have heard much about Mr. Benjamin from my grandfather. I wish that more such articles would appear in the JOURNAL. There is ample material for a similar article on the famous S. S. Prentiss who also lived in the same section; and I wish some one would furnish one.

L. S. STRAHAN.

Lovell, Wyo., Aug. 31.

Requirements for Admission to the Bar

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

"Fewer lawyers and better lawyers." This statement in the form of a caption preceded an article in a recent issue of a legal magazine and may well provoke thought on the part of those who desire to keep the legal profession in proper esteem.

Within recent years there has been an increasing amount of discussion of the fact that the number of lawyers in this country is growing in an unprecedented manner. This fact would not necessarily warrant adverse criticism but in too many instances the further statement is made, not without some apparent cause, that admission to the bar is becoming too easy and that many are licensed as Attorneys who are lacking either in moral or in educational qualifications.

Recently a prominent Attorney remarked that the requirements for admission to the bar in some states constitute "little more than a gesture." This statement was made in connection with a discussion of an irregularity on the part of a member of the bar, in a state where requirements for admission to practice are comparatively lenient. The irregularity in question involved an alleged criminal matter and at the time the above statement was made, the Attorney charged with said digression was under indictment for the crime alleged.

It may be needless to set out that one of the highest duties of the legal profession is to safeguard its own integrity, yet under conditions which now exist in some states it is practically impossible to exclude from admission many who may be lacking in qualifications of capability or of character. Unless this situation is more adequately dealt with than it has been in some instances, within recent years, it is to be expected that public confidence in Attorneys as a class will certainly decline, however great an injustice this would be to the large majority of those who constitute the legal profession.

We, as members of the bar, feel that the practice of law gives opportunities for a higher type of service than that afforded by any other calling. It is in keeping with the responsibilities and opportunities of the profession that the most satisfying safeguards be thrown about it and that only those

be admitted to the practice who have been properly approved and who give reasonable assurance of capably meeting the responsibilities of its duties. It is to be regretted, however, that in some states less academic preparation is required of an Attorney than of any other professional man, while practically no attention is given to the matter of moral qualifications. An Attorney should be fortified not only by (1) adequate educational preparation and (2) ability, coupled with an earnest desire for competency, but (3) he should also be possessed of a strength of character in keeping with his responsibilities. Prof. H. B. Schermerhorn of the Vanderbilt Law School (Nashville, Tennessee) recently made the remark in connection with a discussion relative to requirements for admission to the bar, that "a practitioner should be a gentleman first"; yet how few states there are which maintain any considerable degree of surveillance of the personal characters of those who apply for admission to the practice. This situation is apparently responsible, at least in part, for the large number of transgressions of legal ethics, some of which are taken cognizance of while more are allowed to pass unchallenged.

We may well ask ourselves, are the requirements for admission to the practice of law, adequate? Is it sufficient that one who memorizes a book of questions upon legal subjects may pass the prescribed examination and enter the practice of the profession? Is law a calling which requires little educational development or is it a profession which necessitates as much training as medicine, the ministry or dentistry? Is a lawyer primarily a businessman whose main objective is financial gain or is he a public servant with a pride in the heritage of his profession?

It is gratifying to observe that certain of our states, though their legal organizations, are indicating an increasing concern to the end that the requirements of those who apply for admission to practice law may more adequately meet the needs of our time. However, in many states there seems to be little attention given to this situation and therefore the suggestion appears worthy of consideration, that the American Bar Association through its designated committees sponsor the drafting of an uniform act which would be recommended to each of the states as a desirable statute governing admission to the practice of law. Individual states would then have the opportunity to enact legislation upon this subject by recommendation of the nation's leaders and each state could feel confident that it would thereby not only make a step forward in general statutory law but that it would properly safeguard admission to a profession which deals with property, liberty and life upon the basis of integrity as its assurance, capacity its justification, and honor its bond.

HERBERT NACE.

Johnson City, Tenn.

Fishing by Hand in Oklahoma

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

After reading with interest and amusement, "Is the Fishing Lawyer an Outcast," by Hon. Andrew Price, in the July, 1929, JOURNAL, I rise to a point of personal privilege.

The enclosed picture represents yours truly, with a ten

pound yellow cat fish, caught by the writer, by hand-grabbling, to use the vernacular, in an Eastern Oklahoma stream, a year or so ago.

To avoid any mistake in identity, let me say that the party wearing the straw hat is the writer. He will be glad to explain, in private, of course, in the lobby of the Peabody Hotel, Memphis, Tenn., at the October meeting of the American Bar Association, just how this fish was caught. Any interested may present themselves at that time. No *gentleman* is expected to require strict legal proof.

C. M. GORDON.

Okmulgee, Okla., Aug. 7.

Bankruptcy Problems

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The regulation under known, established, definite, uniform rules of law of insolvent debtors is imperative. Any student of the Insolvency side of the great Commercial World will admit this. To abandon the present National Bankruptcy Act after it has so effectively proven its worth, merely because changing business conditions have necessitated a few minor changes within that Act, would be a step backwards and would be wholly destructive and not at all constructive.

A few organizations and agencies that are inherently opposed to the due administration on a broad and fair basis of the insolvency situations and are apparently seeking to gratify their own greed or favor their own individual needs, rather than have an equitable administration of insolvency estates, are ever alert to cast aspersion upon this Act.

Undoubtedly the Bankruptcy Act is directly assailed and has been since its passage more than any other single enactment by Congress. Yet notwithstanding incessant opposition thereto, not only by the so called selfish agencies but also by the dishonest debtors, it has most successfully withstood all such attacks and most satisfactorily proven its value to the mass of American citizenry. Therefore any attempt to repeal the Act should be most strenuously opposed.

Much just criticism against a few evil practices that have developed in the Administration of Bankrupt estates have been made. It would seem that many of the criticisms against the present method of Receiverships, especially in the large commercial centers are most aptly made. Unfortunately a feeling has arisen in some of these commercial centers among a very limited number of individuals who have associated themselves with the application of the Bankruptcy Act, that the administration of a Bankrupt's estate is for the purpose of establishing a means of livelihood for Receivers, Auditors, Appraisers, Auctioneers and Attorneys without any regard to the rights of the creditors. This feeling has so far developed that in some localities at least, without any need or any showing of necessity, the appointment of a receiver for a Bankrupt estate follows about as regularly as the adjudication, and in most cases with at least, apparent, full power to operate the business of the Bankrupt. The intent of the Bankruptcy Act was undoubtedly that a receiver should not be appointed except in rare cases and that his power to operate the business should be granted only in most unusual instances. Where there is some ministerial act to be performed or property to be preserved there is no good reason why this could not be fully performed by a Custodian or the United States Marshal, or in many cases by the Bankrupt himself, for after all most of the Bankrupts are inherently honest and the exception could easily be cared for.

This brings us up to the question that at present is agitating those who are concerned with Bankruptcy and that is, the Official Receiver. Why could there not be an Official Receiver or a Set of Official Receivers either on salary or percentage compensation? Why could not an Official Receiver perform as effectively as does an appointed Referee? In a very large percentage of the cases now handled by a Receiver with his vast number of aids, assistants and helpers, that eat into the assets of the estates, no receiver at all would be appointed or necessary. In many of the estates the Official Receiver could fully function without the aid of an Attorney for the short time that necessarily lapses until the Trustee qualifies. The Referee is an arm of the Court as also is the Receiver, and it should be his sole duty except in rare instances to simply be a custodian until the representation of all the creditors, the Trustee, comes into power, armed with full power to act.

The tendency of the administration of any law is to deal in so far as possible with human conduct. Law is a rule that governs human conduct. Therefore the Receiver should be a human being and not a corporation, Bank or Trust Company. A corporation, Bank or Trust Company can not act except through human beings. If a corporation, Bank or Trust Company is officially appointed as a receiver in addition to all of the reasons heretofore set forth in opposition thereto, there is this additional reason, that it cannot personally perform but must in turn delegate its powers and rights and duties to employees and not only add to the expense but lessen the efficiency of the Receiver. There is nothing a corporation, Bank or Trust Company is able to do as a Receiver that any individual may not do equally well and there are many things an individual Receiver can personally do without added expense or delegation of power that a Corporate Receiver must necessarily pass on to others.

As to withdrawing from the Act, as an act of Bankruptcy, the assignment for benefit of creditors, this too would be a step backwards. The Commercial World knows too well the result of such private assignments, such as favored creditors, local prejudices against distant creditors, wholly disproportionate expense accounts, a total lack of legal machinery to enforce and recover illegal disbursements and preferential payments and numerous other serious objections. Our commercial field demands a uniform law in these respects for the Nation and it is only by reason of the fact that if the private assignments are not carried out with due care and caution Bankruptcy will follow, that we find such a good record among the reported private assignments.

There are in all branches of the Law new conditions arising which are met not by repealing existing laws but by change of procedure. A legislative enactment is always open to evasion and opposition by a minority, but merely because it is not honestly applied by an unscrupulous Judge at rare intervals or is disregarded by a few disloyal citizens does not justify its condemnation. Most of the hue and cry against the Bankruptcy Act and its application seems to be directed against and possibly due to unscrupulous Receivers and their employees and the manner and method of their gaining their appointments. There seems to be little dissatisfaction of a serious nature with the work of the Trustee. Why therefore could there not be a change in the Receiver's qualification that would be uniform, and if such a change is to be, why should not a Receiver be by law not a corporate entity, but a personally qualified and acting citizen selected by the Court as it does its Referee?

HIRAM E. CASEY.

Los Angeles, April 13.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Alabama

Hon. Bernard Harwood
President Alabama State Bar Association

Alabama State Bar Meets

The fifty-second annual meeting of the Alabama State Bar Association was held at Tuscaloosa on July 5 and 6. The meeting, according to the printed program, was called to order at 10 o'clock Friday morning, by Oscar W. Tompkins, president, followed by invocation by Dr. Joseph P. Boone, pastor of the First Baptist Church of Tuscaloosa. Clifton H. Penick, president of the Tuscaloosa County Bar Association, welcomed the visiting delegates, and Dr. George H. Denny, president of the University of Alabama, welcomed the visitors to that institution. Frank Dominick of Birmingham, responded to the welcome addresses.

The Friday morning session also included an address by Judge William H. Tayloe, of Uniontown, on "What Is Law?" two open forums, and an explanation of "Civil Death" by Travis Williams, of Russellville. The afternoon session featured reports of committees; an address on "Why a Layman Should Study the Constitution," an open forum, automobile ride including inspection of new plant of Gulf States Paper Corporation, reception to visiting ladies at Doster Hall and an old fashioned Southern barbecue at the Tuscaloosa Country Club.

Memorial services were conducted Saturday morning by C. B. Verner, chairman, followed by short addresses on the life and character of members who have died since the last meeting.

At 10:30 o'clock members of the association elected new officers and transacted other business. Judge Bernard Harwood, of Tuscaloosa, was chosen president.

At Saturday morning's session there was an address by United States Senator McKellar of Tennessee, on "Close-ups in the Senate," followed by adjournment.

Arkansas

Arkansas Bar Indorses World Court

The Arkansas State Bar Association passed a resolution endorsing the World Court and requesting the state's senators to "support any voters and confirm any treaty looking to the adherence of the United States to the World Court," at its annual meeting at Hot Springs on June 7 and 8. The resolution was offered by Hon. George B. Rose of Little Rock, immediately following a brief address on the subject.

The thirty-second annual meeting convened at 11 a. m. on Thursday at the Arlington Hotel. Rev. J. R. Oglesby of Hot Springs delivered the invocation. Mr. W. G. Bonic, of Hot Springs, prosecuting attorney, delivered the address of welcome and the response was made by Mr. Grover T. Owens of Little Rock.

The address of President J. Merrick Moore of Little Rock was the feature of the Thursday morning session. He spoke on the "Power of State Commissions to Regulate Public Utility Holdings." In speaking of the power of state commissions to regulate public holding companies the president declared, according to a newspaper account of the meeting, that there are two ways in which the holding companies might be regulated by state commissions. The commissions might, the law permitting, be authorized to regulate them directly, as public utilities, upon the theory that their control of the operating companies justifies direct regulation, or might regulate them indirectly, by controlling their relations with their constituent operating companies.

There have recently been put forward, the speaker said, proposals to change the existing status of state regulation of holding companies, to extend direct regulation beyond the present limits. These proposals have emanated chiefly from various state public utility commissioners, "who apparently feel that the situation demands additional legislation."

"Up to the present time," he continued, "there appears to be no general demand on the part of the public for more direct regulation of the holding companies. Indeed, so far as can be gathered from the views of those who have spoken on the subject, it is generally considered that the entrance of the holding company into the utility field has been more beneficial than otherwise, by providing more and independent utility plants, resources of money which otherwise could never have been obtained, thus enabling the various utility plants to place at the disposal of their customers a more up-to-date and efficient character of service than ever before."

Other addresses delivered at this meeting were by Associate Justice E. L. McHaney of Little Rock, who presented "A Review of Legislation of the Last General Assembly;" Cecil Warner, of Fort Smith, who spoke on "Regulation of the Use of Highways by Motor Vehicles in Interstate Commerce;" George P. Pugh, of Little Rock, whose subject was "Nisi Prius Courts;" Mr. Gray Carroll, of Tulsa, Oklahoma.

Judge James B. Hill, of Fort Smith, presented to the convention a large number of telegrams from officers and organizations in that city, inviting the Association to hold its next meeting there in conjunction with the Oklahoma Bar Association.

Mr. Phil M. Canale, of Memphis, urged Arkansas attorneys to attend the annual session of the American Bar Association, which will convene in the Bluff City next October. He was followed by Judge S. H. Mann, Little Rock, who told the convention it was an opportunity attorneys should not miss.

Indiana

James M. Ogden
President Indiana State Bar Association

Indiana State Bar Holds Meeting

The Indiana State Bar Association held its Thirty-third Annual Meeting at Gary, Indiana, on July 11th and 12th. About three hundred and fifty lawyers and their families attended and the attendance of members at all sessions was greater than in previous years. The program was not overcrowded and this was found to be advantageous to the interest as well as the attendance at the sessions.

The Gary Committee headed by W.

W. Miller provided excellent entertainment for the lawyers and their wives. They provided a fish fry dinner at the Lake Front Pavilion, trips through the mills of the U. S. Steel Corporation, the dense industrial district of East Chicago, Whiting and Hammond, passing the huge oil refineries and steel plants and an automobile trip to State Dune Park and Dune Acres.

The outstanding features of the meeting were an address by Merle M. Wall, of Logansport, on "Law Enforcement," with discussion led by Silas E. Kivett, of Martinsville; an exposition by George Oscar Dix of Terre Haute, of "The New Indiana Corporation Act;" a description by Judge Grant Crumpacker, of South Bend, of "Some of the Problems of the Judges," and an address by Elmer Stout, of Indianapolis, on "Banking." The retiring President, Henry B. Walker, related some of his observations concerning conditions in Europe. Judges Martin and McMahan reported on the conditions of the higher courts.

Gold medals were presented to two secondary school pupils, Thomas B. Millikan of New Castle and Thomas H. Daly, of Hammond, winners of the oratorical and essay state contests on the Constitution. Mr. Millikan gave his oration.

James A. Van Osdol, an ex-President of the Association, presented a resolution, which was adopted unanimously, proffering the cooperation of the Association in the Conference on Law Observance and Law Enforcement authorized by the recent session of the Indiana General Assembly.

The following officers were elected: President, James M. Ogden, Attorney General of Indiana; Vice-President, William W. Miller, President of Gary Association; Secretary-Treasurer, Joel A. Baker.

The time and place of the next meeting will be determined by the Board of Managers.

Joel A. Baker, Secretary.

Minnesota

Minnesota Bar Urges Entry in World Court

America's entry into the World Court was indorsed at the annual meeting of the Minnesota State Bar Association, held at Breezy Point on July 11 and 12. The Secretary was instructed to send each senator a copy of the resolutions.

The presence of Senator James A. Reed at the meeting as one of the principal speakers on the program lent piquancy to this action of the Association.

In response to a request for an expression from the correspondent of the Minneapolis Tribune, Senator Reed said: "I question seriously whether the lawyer who proposed the resolution indorsing the World Court for America was as prepared on the real objects of it as he would be in the fundamentals of a case he was to argue in court," said Senator Reed in commenting on the association action. "I wonder if those who approved the indorsement know just what America is stepping into when she becomes a member of this agreement? I debate with myself whether these gentlemen appreciate the fact that world court ukases if necessary must be enforced with arms? And I ask what other country is there that will take up arms against America for the enforcement of a world court order repugnant to the people of the United States?"

In his address on the following day the Senator commented on the World Court and maintained that it would be folly for this country to align itself with it.

There was considerable debate on the floor when the resolution urging entry into the tribunal was presented, and it was intimated after the resolution had passed that an effort would be made at a subsequent session to induce the Association to rescind its action. However, nothing of the sort was done and the indorsement stands.

S. D. Catherwood, of Austin, was elected president at the closing session. Hugh McClearn of Duluth was chosen vice-president and Chester L. Caldwell, of St. Paul, was named Secretary. William G. Graves, also of St. Paul, was elected Treasurer.

Thomas C. Daggett of St. Paul, retiring president, presided at the annual dinner. Mr. Catherwood and John F. D. Meighen, of Albert Lea, were among the speakers. A dance followed the dinner.

The new Board of Governors, elected by the several judicial bar associations, was announced in part, as follows:

First District, Arthur E. Arnston, Red Wing; second district, Harold C. Kerr, Charles Bunn and George W. Markham, all of St. Paul; third district, Herbert M. Bierce, Winona; fourth district, Morris B. Mitchell, Wilbur H. Cherry, Lee B. Byard, and George B. Leonard, all of Minneapolis; fifth district, F. A. Alexander, Owatonna; sixth district, R. W. Roberts, Mankato; seventh district, D. B. Carman, Detroit Lakes; eighth district, Charles W. Quandt, Winthrop; ninth district, James B. Hall, Marshall; tenth district, J. O. Peterson, Albert Lea; eleventh district, H. A. Dancer and H. A. Carmichael, Duluth; twelfth district, E. W. Campbell, Litchfield; thirteenth district, not elected; fourteenth district, Theodore Quale, Thief River Falls; fifteenth district, not elected; sixteenth district, C. E. Houston, Wheaton; seventeenth district, E. L. Morse, Blue Earth, and eighteenth and nineteenth districts, not elected.

Six honorary members, all past presidents, were named on the board of governors. They are: F. E. Putnam, Blue Earth; F. H. Stinchfield, Minneapolis, and Thomas C. Daggett, William G. Graves, Chester L. Caldwell and S. D. Catherwood, all of St. Paul. Mr. Daggett is the present head of the state bar association.

Montana

Montana Bar's Forty-Third Annual Meeting

The Montana Bar Association held its forty-third annual meeting in Lewiston on August 9th and 10th. The session was opened by an address of welcome by Roy E. Ayers of Lewiston, with response by John C. Mahan, of Helena, and the address of the President, O. W. Belden, of Lewiston.

An interesting feature of the meeting was the introduction of Col. O. F. Goddard, District Judge at Billings, one of the eleven survivors of the Montana Constitutional Convention. Col. Goddard made a brief address in which he referred to his visits to Lewiston in the early days.

Able addresses were made by Walter L. Pope, Acting Dean of the Law School of the University of Montana, and by W. H. Hoover, the former on the "Rule-Making Power of the Courts," and Mr. Hoover on the subject of "Legal Ethics."

An address on Law Enforcement by Congressman Scott Leavitt, was followed by a discussion of the subject, led by Judge E. K. Cheadle of Lewiston. The convention, by a unanimous vote, ordered that Judge Cheadle's address be printed in pamphlet form for distribution. Judge W. L. Ford, of White Sulphur Springs, made the suggestion that in the selection of jurors a great improvement could be secured by doing away with the entire exemption list. He did not think the exemptions were based on any good reason and they prevented the use of the best qualified men of the state for such service. This was one suggestion that appeared to have the general approval of the meeting.

A resolution was adopted regarding an amendment to the present redistricting law of the state to correct faulty redistricting, apparently ill-advised and not duly considered.

The following officers were elected for the coming year: Walter L. Pope, Missoula, President; E. K. Matson, Lewiston, Secretary-Treasurer. District Vice-Presidents: R. T. Nagle, Helena; T. J. Walter, Butte; R. E. McHugh, Philipsburg; R. A. O'Hara, Hamilton; T. E. Gilbert, Dillon; Frank Arnold, Livingston; R. Hildebrand, Glendive; J. T. Wuerthner, Great Falls; Roy McKeister, Bozeman; Charles W. Buntin, Lew-

Walter L. Pope
President Montana Bar Association

iston; Hans Walchli, Kalispell; G. C. Schmidt, Ft. Benton; W. J. Jameson, Billings; C. A. Linn, White Sulphur Springs; H. V. Beeman, Forsyth; C. H. Loud, Miles City; Thomas Dingnon, Glasgow; Arthur F. Lame, Havre; T. H. Pridham, Choteau; A. C. Ericson, Plentywood.

New York

Federation of Western New York Bar Associations

Three hundred and thirty attorneys representing the various Bar associations of the counties of Western New York met at Niagara Falls, June 29, according to the Buffalo Daily Law Journal. The occasion was the fourth annual meeting of the Federation of Bar Associations of Western New York. The Niagara County Bar Association and the Lawyers Club of Niagara Falls were the joint hosts to the Federation and both organizations were made the recipients of numerous congratulations for the excellent manner in which the events of the day were taken care of.

The morning and afternoon sessions were held in the ballroom at the Hotel Niagara, with lunch intervening, and in the evening the attorneys had dinner at Hotel Clifton in Niagara Falls, Ontario, afterwards enjoying an especially-arranged trip through Niagara Gorge. As president of the Federation, Robert H. Jackson of Jamestown delivered the president's report at the morning session, afterwards presenting Hon. Frank S. Hiscock, president of the New York State Bar Association and formerly chief justice of the Court of Appeals, who presided. At the afternoon session, Philip J. Wickser, first president of the Federation, presided.

The speakers of the day, whose scholarly and interesting addresses were received with close attention and enthusiastic applause by the attorneys present, were Hon. Cuthbert W. Pound, associate judge of the Court of Appeals; Dean Charles E. Clark of Yale University School of Law; Arthur Goodhart, editor of "Law Quarterly Review" of London, England; Hon. Meier Steinbrink of Brooklyn; Hon. William L. Marcy, Jr., member of the Judiciary Committee of the New York State Assembly, and George Van Schaick of Rochester. Talks dealing with conditions in the Fourth Department were delivered by Nelson J. Palmer, representing the Chautauqua County Bar; Nathan D. Lapham, the Geneva Bar, and Raymond A. Knowles, the Niagara County Bar.

One of the concluding events of the day's meeting was the election of officers for the ensuing year. With the exception of Chas. Signor, of Albion, vice-president, all officers of the past year were re-elected. The officers for the coming year, therefore, will be Robert H. Jackson, Jamestown, president; Robert L. Rice of Niagara Falls, selected to succeed Mr. Signor, vice-president; Edward R. Foreman, Rochester, vice-president; Nathan D. Lapham, Geneva, treasurer, and Leland G. Davis, secretary.

William G. Pickrel
President Ohio State Bar Association

Ohio

Ohio Bar's Fiftieth Annual Meeting

The Ohio State Bar Association held its fiftieth annual meeting at Cedar Point, July 11 and 12. It was a very busy meeting, to judge from the report of its manifold activities in the Ohio Bar Association Report. Among other things it requested the State Supreme Court not only to adopt such rules as will prevent the unethical and unlawful practice of law but also to define the practice of law, which seems a fair proposition.

It also tackled the irresponsible motorist problem again by adopting a resolution that the Committee on Licensing of Motorists be continued for the purpose of securing such legislation as may be proper to insure financial responsibility of automobile drivers. In addition, it authorized appointment of a Committee on the Unethical Practice of Law, to consist of seven members in good standing, who shall be charged with the duty of hearing all complaints relating to the unauthorized practice of law by individuals, partnerships, associations or corporations, and of making necessary investigations; adopted the report of the Committee on Legal Education "recommending the discontinuance of law office study in preparation for the bar, and requiring law schools to certify that a student has satisfactorily completed the required work of the law school;" appropriated $1,500 for use in providing Ohio annotations to selected subjects on the American Law Institute's Restatement of the Law.

The first session was devoted to the reports of officers and committees. Secretary Henney told of some of the accomplishments of the Association during the last nine years, giving particular attention to the growth of the information service at headquarters and the progress of the Association's official publication, "The Ohio Bar." Treasurer Marshall G. Fenton reported a total membership of 3,313 and a very satisfactory condition of the organization's finances.

The noon luncheon of the first day was in charge of the Common Pleas Judges Association. It was addressed by its President, Judge J. H. C. Lyon, of Youngstown, and Mr. Thomas F. Lee of New York City.

President John A. Elden of Cleveland delivered the annual presidential address at the afternoon session. He "recommended a change in the functioning of the Grievance Committee to permit use by it of a full or part time Executive Secretary;" the drawing of a strict line between activities that may properly be followed by corporations or other lay agencies and the matters belonging solely to the legal profession; and the change of the curricula of law schools in order to give the young lawyer a firmer grasp of business problems.

At this session the Association adopted various recommendations made by the Committee on Judicial Administration and Legal Reform. One of these was for the submission to the legislature of a constitutional amendment permitting a majority of the Supreme Court to pronounce decisions on all classes of cases. Another was for prosecution by information on certain cases, and still another was for the resubmission to the legislature of a bill making citizenship a pre-requisite to the practice of law.

Hon. Henry Upson Sims of Birmingham, Alabama, then delivered an interesting address on "The Field for Future Work of Bar Associations." Mr. Sims said that while in the law, as other professions, this is an age of specialization, still the lawyer must "strive more and more to become acquainted with all the fundamental principles of the whole law and their relation to each other, and to keep thoroughly in touch with their development and changes;" that while individuals and groups of scholars and students of the law are doing much to improve law and perfect judicial administration, they can not take the place of bar associations, and that such associations are the special guardians of the law of their own states; and that he felt that within 20 years the bars of each state and the nation will be sufficiently organized to exercise authority over the law and its enforcement throughout the nation.

In the evening the regular meeting of the Conference of Bar Association Delegates was held, Chairman George B. Harris, of Cleveland, presiding. Hon. Joseph S. Graydon of Cincinnati, delivered an address upon "The Noble Experiment, a New Phase," in which he discussed the constitutional question as to whether the Eighteenth Amendment would preclude the manufacture and sale of intoxicating liquors by states, expressing the opinion that there was no constitutional inhibition against it, but that the Congress could nullify such action by making it unlawful for the citizen to purchase that which the state might lawfully sell.

On resolution, the Conference favored requesting the State Association to urge the Legislature to give adequate financial support to the Judicial Council of Ohio, and immediately to take steps to create a fund to finance the activities of the Council for the next two years.

The Conference adopted a resolution to request the State Bar Association to take such steps as it deems proper to aid in the proposed study by Johns-Hop-

kins University of judicial administration in the state.

A resolution by Frank F. Gentsch of Cleveland, that the Eighteenth Amendment and the Volstead Act be repealed was tabled by a vote of 27 yea to 25 nay, many present not voting.

At the Friday morning session of the Association Mr. Samuel J. Doerfler of Cleveland addressed the Association on "Methods of Remedying Unauthorized Practice of Law." At the following session Hon. Simeon Johnson of Cincinnati, a past president of the organization, spoke on "Fifty Years of Progress of the Ohio State Bar Association."

Meetings of important sections of the Association were held. At a luncheon on Friday, under the auspices of the Military Section, Col. E. G. Rarey, of Cleveland, chairman, presided, and Hon. Newton D. Baker spoke on the present crime situation, referring briefly to the Hoover Commission of which he is a member, and discussing at some length the effect of the World War on the minds of men. The Prosecuting Attorney's Section was presided over by Hon. Richard H. Bostwick of Chardon as chairman. Hon. Gilbert Bettman, Attorney General of Ohio, made an address in which he "deplored the tendency to seek to centralize all authority for enforcement of the law in Columbus in the hands of the Attorney General, and vigorously urged that the sheriff, the law enforcement officer of the county, and the prosecuting attorney, his adviser, be zealous to see that the time-honored theory of our government, that law enforcement should be in the hands of local officials responsible to their own communities, should not be abandoned because of lack of enforcement on the part of local officials; that the state authorities be called upon only when the local governments were prostrated or the local officials were unable to cope with situations."

The proceedings of the Judicial Section were presided over by Hon. Robert H. Day, Judge of the Supreme Court of Ohio.

Judge Day introduced Hon. J. Weston Allen of Boston, former Attorney General of Massachusetts, who addressed the Convention on the subject, "The Puritan and the Law," in which he pointed out the tremendous influence of the Puritans on the subsequent course of law and government in United States, with particular reference to the contribution of the Puritans to the government of Ohio.

The following officers of the Association were elected for the ensuing year by acclamation: William G. Pickrel, President, Dayton; John L. W. Henney, Secretary, Columbus; and Marshall G. Fenton, Treasurer, Columbus.

Pennsylvania

Noteworthy Meeting of Pennsylvania Bar

The thirty-fifth annual meeting of the Pennsylvania Bar Association was held at Bedford Springs, Pa., on Wednesday, Thursday and Friday, June 26, 27 and 28, 1929.

The meeting was a noteworthy one, because of the work that was accomplished and of the type of the papers read, but very largely because of the fact that the second Judicial Conference, attended by practically all of the Judges of the State, called by the Chief Justice, was held at Bedford Springs on Monday and Tuesday preceding the Association's meeting.

On Wednesday, the opening day, at the morning session, the members were privileged to hear a remarkable address by Honorable George Wharton Pepper, the President, the title of which was "This Profession of Ours." This address has been published in full in the Legal Intelligencer and the Pittsburgh Law Journal.

At this same meeting, all of the committees submitted reports, as did also the Treasurer and the Secretary.

On Wednesday afternoon the ladies in attendance were entertained at tea and a reception by Mrs. Pepper and the ladies of her committee.

The banquet on Wednesday night was quite unusual and was greatly enjoyed by the largest attendance that the Association has ever had. The banquet was tendered to the Judges of the Commonwealth to signalize twenty-five years of service on the Bench by Chief Justice von Moschzisker. President Pepper acted as Toastmaster and addresses were delivered by Honorable Frank M. Trexler of the Superior Court, Honorable William H. Kirkpatrick of the United States District Court, Honorable Cyrus E. Woods, Attorney General, Honorable Francis Shunk Brown, Chancellor of the Law Association of Philadelphia, and by the Chief Justice.

On Thursday morning the Conference of Delegates from local Bar Associations was held. Fifty-two local Bar Associations were represented in the Conference. The subject considered was the broad one of closer affiliation between the Pennsylvania Bar Association and the local associations throughout the state. Those who attended the Conference felt that much was accomplished and that great strides had been made toward ultimate state-wide affiliation and a real solidarity of the Bar of the State. Following the Conference of Delegates a business meeting of the Association was held, at which reports of committees were further considered.

On Thursday night members were entertained by two papers, one by William Hard, Esquire, the Washington correspondent, on the subject: "The Lawyer as Lobbyist," the other by Willmott Lewis, Esquire, the Washington correspondent of the London Times, on the subject: "The Lawyer as an Officer of Justice.

On Friday morning the members listened to two carefully prepared and most interesting papers, one by John H. Fertig, Esquire, Assistant Director of the Legislative Reference Bureau of Pennsylvania, on the subject: "Summary of Legislation Enacted by the Legislature of the 1928-1929 Session," the other by Kingman Brewster, Esquire, of the Washington, D. C., Bar, on the subject: "Federal Tax Procedure." Following these papers and the transaction of business, the election of officers for the ensuing year was held. Honorable Bernard J. Myers of Lancaster was elected to the presidency and the following were elected vice-presidents, representing eight zones into which the state has been divided as part of the effort toward integration of the Bar:

First Zone, J. C. Taylor, Delaware County; Second Zone, Daniel W. Kaercher, Schuylkill County; Third Zone, John D. Faller, Cumberland County; Fourth Zone, Charles C. Lark, Northumberland County; Fifth Zone, Cornelius Comegys, Lackawanna County; Sixth Zone, Harry A. Cottom, Fayette County; Seventh Zone, John L. Nesbit, Venango County; Eighth Zone, W. I. Woodcott, Blair County.

Bernard J. Myers
President Pennsylvania State Bar Association

Fidelity-Philadelphia Trust Company was re-elected Treasurer and Harold B. Beitler was re-elected Secretary.

One member of the Executive Committee from each of the eight zones was also elected.

On Friday evening the members listened to a remarkably interesting address by Honorable William J. Donovan, former Assistant Attorney General of the United States, in the course of which Colonel Donovan made some suggestions looking to the safeguarding and stabilizing of business by having the legality of combinations inquired into and passed upon by some body representing the Government, in advance of the combination.

Some of the committee reports were of great interest.

The Committee on Civil Law reported that three of the five statutes suggested in their report of last year for adoption had been passed by the recent Legislature, and had become law. The first, Act No. 169, repeals the earlier statute prohibiting the printing of preambles of Acts of Assembly. Act No. 197 provides procedure by way of scire facias, whereby a defendant may bring upon the record persons liable over to him or jointly or severally liable with him. Act No. 261 amends the Practice Act of 1915 by clarifying the provisions as to new matter. The committee made several suggestions, one of them for the abolition of the action of Account Render; another providing for the adoption by the Supreme Court and enforcement of general rules prescribing the forms of action and the procedure in civil proceedings at law or in equity.

The Committee on Criminal Law reported upon the cooperation between that committee and the Crimes Commis-

sion of the State, with relation to the proposed reforms in criminal procedure.

The Committee on Grievances reported that during the year it had received ten complaints, mostly of trifling nature, all of which were disposed of by correspondence.

The Committee on Uniform State Laws reported that only one act recommended by the National Conference of Commissioners on Uniform State Laws had been passed at the session of 1929—the Uniform Federal Tax Lien Registration Act, made necessary by the Act of Congress of March 4, 1913. It submitted a summary of the uniform laws so far adopted by Pennsylvania as follows:

Bills of Lading Act (1911), Conditional Sales Act (1925), Criminal Extradition Act (1927), Declaratory Judgments Act (1923), Depositions Act (1923), Fraudulent Conveyance Act (1921), Interparty Agreement Act (1927), Limited Partnership Act (1917), Negotiable Instruments Act (1901), Partnership Act (1915), Proof of Statutes Act (1921), Act Regulating the Operation of Vehicles on Highways (1927), Sales Act (1915), Stock Transfer Act (1911), Warehouse Receipts Act (1909), Written Obligations Act (1927), Federal Tax Lien Registration Act (1929).

The Committee on Legal Aid presented a comprehensive and interesting report of the work done throughout the United States in furthering the idea of legal aid to poor people, with particular reference to what has been accomplished in the different districts of Pennsylvania.

The Committee on Citizenship, which cooperates with the similar committee of the American Bar Association, reported upon the work done in the schools and by public addresses at meetings and by radio during the year.

The Committee on the Power of the Supreme Court to Declare Acts Unconstitutional presented an exhaustive and interesting report reviewing the decisions of the Courts during the year.

The Committee on Program submitted several recommendations of subjects to be considered in the future, among them a general revision of the Corporation Laws of the State, the further repeal of obsolete statutes, an examination and possible revision of the contracts for the printing of the State and Superior Court Reports.

The Committee on Professional Ethics reported a plan for procedure which was adopted by the Association, providing for the appointment in each of the eight zones of a committee to answer questions put to them by members of the Bar of their zone, and for the submission by the several local committees to the Committee of the Association of all questions as to which the local committee is in doubt, so that those questions may be considered by the committee at large, and reported to the Association at its next meeting.

The Committee on Affiliation of County Bar Associations with this Association reported the work that had been done by that committee during the year and submitted to the meeting a sample copy of the Pennsylvania Bar Association Quarterly, as an example of what might be done by the Association by the publication of such a journal in the future. The Report of the Committee was approved and the publication of the Quarterly authorized.

The Committee on the work of the American Law Institute presented a complete report of the work done by that committee and announced that the committee had ready for distribution in book form the re-statement of the Law of Contracts, Sections 1 to 177 as finally adopted by the American Law Institute, with complete annotations to Pennsylvania Law.

The Committee on Disciplinary Procedure reported that it had accomplished the work for which it was appointed and that the necessity for its existence had ceased when the Supreme Court promulgated its new rules creating and appointing the Board of Standing Masters for the Governance of the Bar. The committee was therefore discharged.

When the subject of delegation to the Supreme Court of general rule-making power was under consideration, the Association was addressed by Josiah Marvel, Esquire, of the Delaware Bar, who was present by invitation, having made an exhaustive study of the subject while serving as Chairman of the Conference of Delegates of the American Bar Association.

This meeting will go down in history as one of, if not the most, successful meetings ever held, the success being due in very large measure to the personal efforts put forth by the President, Senator Pepper, and the splendid cooperation which he received from all of the committees.

Harold B. Beitler, Secretary.

Miscellaneous

The Fourteenth Judicial District (Mo.) Bar Association, at a meeting recently held, elected the following officers: G. E. Simon, President; C. H. Swanson, Vice-President; and W. D. James, Secretary and Treasurer.

J. H. Everest was elected President of the Oklahoma County (Okla.) Bar Association, at a meeting of the directors of the Association in June. John Embry was named Vice-President; John E. Brett, Secretary, and Fred Suits, Treasurer.

The following were elected officers of the Audrain County (Mo.) Bar Association, at a meeting of that organization in July: J. W. Buffington, President; E. C. Kennan, Laddonia, Vice-President, Martin Barrow, Vandalia, Secretary-Treasurer, and A. C. Whitson, Mexico, Sergeant-at-Arms.